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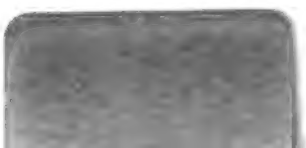

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench.

VOL. I.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.
OF LINCOLN'S INN, BARRISTERS AT LAW.

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VOL. I.

Containing the Cases of HILARY, EASTER, and TRINITY Terms,
In the 53d Year of GEORGE III. 1813.

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SOLICITORS-GENERAL.

Sir WILLIAM GARROW, Knt.
Sir ROBERT DALLAS, Knt.

A

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ERRATA.

Page 11. n. (*a*), for 562 read 652.
12. n. (*a*), for 459 read 469.
54. line 20. after *attend* insert *to*.
137. line 7. for *the former will* read *this will*.
151. line 21. for *conſtanly* read *conſtantly*.
181. laſt line, for *Rule abſolute* read *Rule diſcharged*.
183. marginal abſtract, for *auterfoit* read *auterfoits*.
192. n. (*a*), for 15 read 14.
338. line 8. for Poſtea to the *Plaintiff* read Poſtea to the *Defendant*.
355. line 3. for *plaintiff* read *plaintiffs*.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-Third Year of the Reign of GEORGE III.

1813.

REID *againſt* FRYATT.

Saturday, Jan. 23d.

Where a cauſe was referred under a judge's order with a proviſo that the arbitrator ſhould make his award on or before a day certain; but if he ſhould not be then prepared, that the time ſhould be enlarged from time to time, as he might require, and a judge of the court might think reaſonable and juſt: held that the time for making the award was duly enlarged by the arbitrator indorſing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order, granting ſuch further time was not obtained until a day ſubſequent.

UPON a rule for ſetting aſide an award, the only queſtion was whether the time for making the award had been duly enlarged: as to which it appeared that the cauſe had been referred under a Judge's order, containing a proviſo, that the arbitrator ſhould make his award on or before the 13th of *September*, but if he ſhould not be prepared then, the time to be enlarged, from time to time, as he might require, and a judge of the court might think reaſonable and juſt. On the 12th of *September* the arbitrator made an indorſement on the order of reference, that he required the time to be enlarged to the firſt day of next *Michaelmas* term; and on

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REID *againſt* FRYATT.

the 26th a judge's order was obtained to that effect, and on the 30th the arbitrator made his award.

Park and *Brougham*, who ſhewed cauſe againſt the rule, contended that the time was duly enlarged by the indorſement made by the arbitrator on the day preceding the expiration of the original time allowed for making the award; and that the judge's order ſubſequently obtained, being in the nature only of a confirmation of the act done by the arbitrator, related back to the date of the indorſement.

The Solicitor-General, in ſupport of the rule, maintained that the terms of the order of reference required that both the act to be done by the arbitrator and the judge's order ſhould precede any enlargement of the time, and that conſequently the original time had elapſed before the enlargement could take effect.

Lord ELLENBOROUGH C. J. This is merely a queſtion of grammatical conſtruction on the terms of the order of reference; and upon that conſtruction I own I have no doubt that the judge's order was in time, and that it is not neceſſary it ſhould have been obtained within the time limited to the arbitrator for making his award. The words of the proviſo are "that he ſhall make his award on or before the 13th of *September*; the arbitrator therefore had the whole of the 13th given him for that purpoſe, with power to enlarge the time if he required it: but if any part of that day is to be ſubtracted for applying for a judge's order for enlarging the time for making his award, then he would not have all the time allowed him for that purpoſe by the terms

of

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REID *against* FRYATT.

of the reference. Perhaps then it might be a nice question whether the arbitrator might not have enlarged the time immediately after the expiration of the original period allowed him, but it is enough that he might have done so at the very last moment of that period; and it follows from thence that the judge's order may be subsequent to it, and if once the precise point of time may be passed, then it becomes a question for the judge's discretion. The power of enlarging is placed in the arbitrator, but that power is to receive a subsequent ratification from the judge to give it effect; which has been done in this case: and the judge according to the language of the order has thought it reasonable and just that the time should be so enlarged. This seems to answer the intent of such a provision, which it does not occur to me had any other material purpose than that of authenticating the act of enlargement required by the arbitrator.

The rest of the Court agreed; and *Le Blanc* J. added that this term ought never to be inserted in orders of reference; but that it should be left to the discretion of the arbitrator alone to enlarge the time as he might require.

Rule discharged.

1813.

Monday, *Jan.* 25th.

CAZENOVE and Another *againſt* VAUGHAN.

Where the plaintiffs filed a bill in Chancery for the examination of a witneſs de bene eſſe, to which the defendant did not put in any anſwer, and the plaintiffs afterwards obtained an order of the Court for the examination of the witneſs, and gave notice thereof to the defendant, and of the interrogatories intended to be put, and on the ſame evening examined the witneſs, who left *London* the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the depoſition of the witneſs ſhould be publiſhed in order that it might be read in evidence at the trial: held that the depoſition was admiſſible evidence at the trial, for as the defendant had notice of the time of the examination, he might have croſs-examined at that time, or applied for further time for that purpoſe; and it muſt be preſumed from his not having done either, that he did not wiſh to croſs-examine.

PARK in the laſt term obtained a rule niſi for entering a nonſuit in this action, which was upon a policy of aſſurance, (in which the plaintiffs had recovered a verdict before Lord *Ellenborough* C. J. at the *London* ſittings,) upon an objection made to the admiſſibility of the depoſition of one *Lewis Plitt*, which had been received in evidence for the plaintiffs; reſpecting which it appeared by his Lordſhip's report, that the plaintiffs, after the commencement of this action on the 5th of *May* laſt filed a bill in the Court of Chancery againſt the defendant, for a commiſſion to examine witneſſes abroad, and for the examination of the ſaid *Plitt* de bene eſſe, to which the defendant did not put in any anſwer; on the 15th of *May* the plaintiffs obtained an order of the Court for the examination of *Plitt* de bene eſſe, and gave regular notice thereof to the defendant, and ſerved him with a copy of the interrogatories in chief; and the witneſs was examined on the evening of that day; at which time no croſs-interrogatories were filed, nor did any one on the part of the defendant attend ſuch examination. On the 25th of *June* following the plaintiffs obtained a further order for publication, which after reciting that it was prayed that the depoſitions of *Plitt*, taken de bene eſſe in the cauſe, under the order of that Court might be publiſhed, in order that the ſame might be read as evidence for the plaintiffs at the

trial

trial of this and other actions mentioned in the bill; the order then proceeded thus, "Whereupon and upon hearing counsel for the defendant, this Court doth order that the depositions of *L. Plitt* in this cause be forthwith published." On the day after his examination *Plitt*, who was a foreigner, left *London* for the coast, from whence he embarked in a few days for *Sweden*, where he still remains.

The Solicitor-General and *Scarlett*, who now shewed cause, after stating that the reading of the deposition was opposed at the trial on the general rule, that depositions before an answer put in are not admitted to be read, agreed to that rule, but contended that it was subject to the following exceptions; viz. unless the defendant appear to be in contempt, or has had liberty to cross-examine; and that his declining to cross-examine will not vary the exception. The necessity of such qualifications of the rule is apparent, for otherwise it would be in the power of any defendant, by his obstinacy in refusing to answer, or cross-examine the witnesses, to deprive the adverse party of the benefit of their testimony. Here it appears that the defendant had due notice of the interrogatories proposed to be put to the witness, and it was his fault that he did not put cross-interrogatories; he cannot therefore be permitted afterwards to avail himself of his own neglect.

Park, (with *Richardson* and *Newnham*,) contrà, admitting the exceptions, contended nevertheless that the general rule ought to prevail, unless the defendant is clearly brought within one of the exceptions; and that the party who claims to read the deposition is bound

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CARRNOVE *against* VAUGHAN.

to ſhew the adverſe party either in contempt, or that he has had liberty to croſs-examine according to the practice of the court, and has neglected it. Here it is plain the defendant was not in contempt, and it does not appear that according to the practice of the Court of Chancery, he had liberty to croſs-examine; for the order for examination was only made on the 15th of *May*, and on the ſame evening the witneſs was examined, and left *London* the next morning. The preſumption therefore is, that the defendant had no time to prepare and file his croſs-interrogatories according to the practice of the court.

Lord ELLENBOROUGH C. J. Perhaps it may be as well to ſtate what the rule of the common law is upon this ſubject, which puts an end to the queſtion. The rule of the common law is, that no evidence ſhall be admitted but what is or might be under the examination of both parties; and it is agreeable alſo to common ſenſe, that what is imperfect, and, if I may ſo ſay, but half an examination, ſhall not be uſed in the ſame way as if it were complete. But if the adverſe party has had liberty to croſs-examine, and has not choſen to exerciſe it, the caſe is then the ſame in effect as if he had croſs-examined; otherwiſe the admiſſibility of the evidence would be made to depend upon his pleaſure, whether he will croſs-examine or not; which would be a moſt uncertain and unjuſt rule. Here then the queſtion is whether the defendant had an opportunity of croſs-examining. Now it appears that the plaintiffs filed their bill for the expreſs purpoſe of examining the witneſs; and when they obtained the order for his examination, gave the defendant a regular notice of it,

and of the interrogatories intended to be put to the witneſs. But it is ſaid that the defendant had no time to file croſs-interrogatories, and therefore the notice was of no uſe: yet if he had intimated a wiſh to croſs-examine, and addreſſed himſelf to the Court praying for further time for that purpoſe, there can be no doubt but that he might have obtained it: but he contents himſelf ſimply with paying no attention to the notice. Then comes the order for publication, which is obtained, as it appears, from the terms of the order after hearing counſel on the part of the defendant, who therefore had an opportunity of ſhewing cauſe againſt it. The order for publication recites, "that it was prayed that the depoſitions of the witneſs may be publiſhed in order that the ſame may be read as evidence for the plaintiffs at the trial," and directs as follows: "Whereupon this Court doth order that the depoſitions be forthwith publiſhed." The order therefore purports in its mandatory part, to act upon and adopt the purpoſe for which it is prayed in the reciting part; *i. e.* the ſpecial purpoſe of having the depoſition read in evidence at the trial; for it is not limited by the judge who directed it, to any object ſhort of that for which it was prayed. I muſt conclude then that the judge was ſatisfied before he directed ſuch order to be made, that the adverſe party had all the liberty to croſs-examine which the practice of that court requires; and upon the principle of the common law I have already ſtated that there is no objection.

GROSE J. concurred.

LE BLANC J. The rule is that depoſitions are not allowed to be read before anſwer put in, or before the

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party is in contempt, unleſs he has had an opportunity of croſs-examining; for if he has, and has omitted to avail himſelf of it, then it is his fault, and he cannot make that a ground for objecting to the depoſitions. In this caſe there was no evidence given at the trial to ſhew that the defendant had not liberty afforded him to croſs-examine, or that he might not have exerciſed it; on the contrary, it appears that when the order for examination was made there was no objection interpoſed, nor further time prayed for. It muſt be preſumed therefore that the defendant had an opportunity to croſs-examine and choſe to forego it.

BAYLEY J. I think it muſt be taken from the circumſtances ſtated, that the defendant had liberty to croſs-examine, and did not chooſe to exerciſe it; for when the interrogatories in chief were ſerved upon him, he might have applied for time, had he been deſirous of putting croſs-interrogatories; and there was no proof at the trial that it was his intention to croſs-examine.

Rule diſcharged (*a*).

(*a*) See *Gilb. Evid.* 4th edit. 62. 64. 4 *Mod.* 146. *Howard* v. *Tremaine. Hardr.* 315. v. *Browne*, ſemb. contrà, 1 *P. Wms.* 414. *Copeland* v. *Stanton. Bull. N. P.* 6th edit. 240. *Com. Dig. Evid. C.* 4.

FORRESTER and Others *againſt* PIGOU.

Monday, Jan. 25th.

ACTION on a policy of aſſurance, tried before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term. The defence was (inter alia) that at the time of effecting the policy, a miſrepreſentation had been made to the underwriters by one of the plaintiffs as to the nature of the riſk, it being repreſented as a ſummer inſtead of a winter riſk: to prove which the defendant called a witneſs of the name of *Noble*, who was the firſt underwriter upon the policy, and who ſtated upon the voir dire, "that he had paid the loſs "upon an underſtanding that he was to be repaid in "the event of this action failing, and that he had ſince "received a letter from the plaintiffs promiſing to re-"turn the money in that event." Lord *Ellenborough* held that the witneſs was incompetent. The defendant then called another witneſs named *Gregory*, the ſecond underwriter on the policy, who upon the voir dire ſtated "that he had paid the loſs, but he had been ſince pro-"miſed by one of the plaintiffs that he ſhould be placed "in the ſame ſituation with the other underwriters, if "they did not ſettle." Upon this ſtatement the Lord Chief Juſtice inclined againſt the admiſſibility of this witneſs, and he was alſo rejected. The jury found a verdict for the plaintiffs.

The firſt and ſecond underwriters upon a policy of aſſurance, who have paid the loſs upon an undertaking made to them by the aſſured to repay the money, in caſe they failed in an action brought by them againſt a ſubſequent underwriter, ſeem not to be competent witneſſes for the defendant in that action, to prove that one of the aſſured when he effected the policy miſrepreſented to them that it was a ſummer inſtead of a winter riſk: but if on the firſt trial of that action it do not appear whether the undertaking was made to the witneſſes at the time they paid the loſs or afterwards, and after the action was commenced, this court will ſend the caſe down to a ſecond trial in order to aſcertain that fact.

Park obtained a rule niſi in *Michaelmas* term for a new trial, on the ground taken in *Bent* v. *Baker* (*a*), as

(*a*) 3 *T. R.* 34.

deduced

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deduced from the case of *Barlow* v. *Vowell* (*a*), that an underwriter to whom a communication had been made by the assured respecting the particular risk insured, and in whose testimony therefore all the subsequent underwriters on that risk had acquired an interest, should not be permitted by an act done in concurrence with the assured, to disqualify himself as a witness, and deprive the underwriters of the benefit of his testimony.

The Solicitor-General, *Marryat*, and *Gaselee* now shewed cause, and maintained that both the witnesses were incompetent, inasmuch as they had a direct interest in the cause. *Noble* had received an express undertaking at the time of payment; by virtue of which, if the plaintiffs did not recover in this action, he would be entitled to get back the whole of the money paid to them as the amount of the loss. The other witness indeed had not received an express undertaking at the time; but still he stood under the impression that the effect of his evidence, if it should succeed, would be to reimburse him in like manner; and if the plaintiffs had not succeeded, he might have sued on the subsequent promise made to him: and if either of the witnesses were to sue for repayment, the verdict in this action would be evidence for them to shew that the event had happened upon which the promise of repayment was made to them; and therefore this case falls immediately within the rule recognized in *Bent* v. *Baker*, for the witnesses are directly interested in the event of the suit. It may be admitted that a person who is in

(*a*) *Skin.* 586.

other

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other reſpects a competent witneſs, cannot by any voluntary act of his own render himſelf incompetent, ſo as to diveſt the parties intereſted in his teſtimony of their right to his teſtimony, by laying a wager upon the event, unconnected with and collateral to the ſuit. The preſent caſe however is not like that; for this was not a wager but a payment made under a fair mercantile engagement, and was not unconnected with the ſubject of this action, but was paid in order to prevent a ſimilar action from being brought againſt the witneſs. The caſe therefore is quite diſtinct from that of an idle wager. As to the caſe of *Barlow* v. *Vowell*, where *Holt* C. J. is ſaid to have ruled that a perſon who made himſelf a party in intereſt after a plaintiff or defendant had an intereſt in his teſtimony, could not deprive them of the benefit of his teſtimony; as if he be witneſs of a wager, &c. and afterwards bet on the ſame matter: it appears from that caſe not only that the wager was perfectly idle, but alſo that the witneſs was in the ſame ſituation as the broker in the caſe of *Bent* v. *Baker*, having been ſelected as the witneſs of the original wager. [*Bayley* J. There is a caſe in *Strange* (*a*), which does not admit of that diſtinction, where the proſecutor of an indictment had laid a wager that he ſhould convict the defendant, and yet he was holden to be a competent witneſs for the crown.] There the public intereſt in having his teſtimony in a criminal proceeding was paramount.

Park and *Topping* contrà. In *Bent* v. *Baker* (*b*) this queſtion was fully diſcuſſed; and in *Smith* v. *Prager* (*c*)

(*a*) *R.* v. *Fox*, 562. (*b*) 3 *T. R.* 27.
(*c*) 7 *T. R.* 60.

Lord

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Lord *Kenyon* referring to that case said, "that the rule there laid down was, that no objection could be made to the competency of a witness on the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." Taking then that as the rule, it may be asked in this case how the witness was interested in the event of the suit. It is quite clear that this verdict would not avail him in any action brought against the plaintiffs to recover back the money paid, for he paid it with full knowledge of the circumstances; and according to the case of *Bilbie* v. *Lumley* (*a*), an underwriter who has paid a loss with full knowledge of all the circumstances, cannot recover the money back. [*Bayley* J. In that case there was not any promise to refund.] The promise would make no difference if there never was a liability. At all events, the witness *Gregory* stands clear of any interest; there being no undertaking to him at any time; and as to *Noble*, he was not interested until after the action was brought; for he paid the loss without any condition, and the promise to repay it was subsequent to the action; therefore if this objection prevails, the plaintiffs by their own act after action brought will be allowed to defeat the interest which the defendant had in the testimony of the witness; and, at the same time, will secure to themselves success in the action. [Lord *Ellenborough* C. J. I think you overstate the case as to *Noble*. The witness said that he paid his subscription on the understanding that if the plaintiffs did not succeed, he should be repaid: the letter was

(*a*) 2 *East*, 459.

subse-

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ſubſequent.] The letter was twelve months after the ſettlement of the loſs, and was alſo ſubſequent to the commencement of the action. The communication made to *Noble*, the firſt underwriter on the policy, gave every ſubſequent underwriter an intereſt in his teſtimony. The plaintiffs knew that he and the other witneſs were the only perſons capable of giving evidence for the defendant reſpecting that communication; it ſhall not be endured then that, pending the action, the plaintiffs ſhall ſo negociate with the witneſſes, as to deprive the defendant of their teſtimony.

Lord ELLENBOROUGH C. J. There is a difference as to one of the witneſſes, viz. *Gregory*; for it did not appear whether the undertaking was made to him at the time when he paid the loſs. That fact I ſhould wiſh to have better aſcertained. The undertaking to *Noble* appears to have been at the time, although there was a ſubſequent confirmation of it by letter: but as to *Gregory*, the time does not appear. If then either of the witneſſes was in a condition to be admitted, there ought to be a new trial. Whenever the queſtion comes diſtinctly before the Court, whether a communication to the firſt underwriter is virtually a notice to all, I ſhall not ſcruple to remark that that propoſition is to be received with great qualification. It may depend upon the time and circumſtances under which that communication was made; but on the mere naked unaccompanied fact of one name ſtanding firſt upon the policy, I ſhould not hold that a communication made to him was virtually made to all the ſubſequent underwriters. But the queſtion is of ſuch magnitude, that if it ſhould ariſe, I ſhould direct it to be put on the record, in order that

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that it might be ſubmitted to the conſideration of all the judges. In this caſe one of the aſſured, being the perſon who alſo effected the policy, the defendant ex neceſſitate is more thrown upon the teſtimony of the underwriters than in ordinary caſes, where the policy is effected through the medium of a mere broker. It will be proper therefore that the caſe ſhould undergo another conſideration, in order to aſcertain the time when the undertaking was made to *Gregory* in particular, and alſo to the other witneſs. In the caſe of *Barlow* v. *Vowell*, it certainly does appear, as has been ſuggeſted in the argument, that the witneſs was the original witneſs of the wager. It was a fraud therefore to deprive the party of the benefit of his teſtimony. So in *Bent* v. *Baker* the broker was the common agent and witneſs of both parties; and therefore his teſtimony was not to be taken from them. But if a perſon who is under no obligation to become a witneſs for either of the parties to a ſuit, chooſe to pay his debt beforehand, upon a condition that is to be determined by the event of that ſuit, he becomes as much intereſted in the event as if he were a party to a conſolidation rule.

Per Curiam, Rule abſolute.

BRIDGES and Others *againſt* HUNTER.

Monday, Jan. 25th.

ACTION on a policy of aſſurance, dated the 12th of *November* 1808, on wines on board the *Stag*, at and from *Oporto* to *Liverpool* and *Lancaſter*, at eight guineas per cent. premium to return four for convoy and arrival; which was tried before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term. The caſe reſted principally upon admiſſions; by which it appeared that the ſhip was laden on the 11th and ſailed on the 13th of *October* 1808, from *Oporto* to join convoy, but never came up with it, and was obliged to put into *Liſbon*; from whence ſhe ſailed about the 10th of *November*, and was afterwards loſt by the perils of the ſeas. The convoy which ſhe attempted to join arrived on the 30th of *October*; and on the 1ſt of *November* a liſt of ſhips that ſailed with it was entered at *Lloyd's*, which did not include the ſhip in queſtion. The following was one of the admiſſions read at the trial, "that it is to be taken that no communication was made to the defendant at the time of effecting the policy, of any letter or other information except what the policy contained; unleſs upon the trial the plaintiffs are enabled to prove that ſome communication was made." The defence was that the plaintiffs had made no communication to the defendant at the time when the policy was effected, of two material letters, written on the ſaid 11th and 13th of *October*, from their correſpondents at *Oporto*, both of which were received on the 31ſt of *October* by the plaintiffs, and then in their hands; and the firſt of thoſe letters, dated the 11th

Where the plaintiffs effected a policy of aſſurance on wines, from *Oporto* to *London* on the 12th of *November*, at which time they were in poſſeſſion of two letters from their correſpondents at *Oporto*; the firſt of which dated 11th of *October* ſtated thus; "*We are loading the wines on the* Stag, *Captain* Wheatley, *who pretends to ſail after to-morrow;*" the other dated the 13th of *October* incloſed the bills of lading, which were filled up "*with convoy;*" which letters the plaintiffs did not communicate to the underwriters: held that it was a material concealment.

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11th of *October*, contained the following extract; "We are loading the wines on the *Stag*, Captain *Wheatley*, who *pretends* to sail after to-morrow:" the other, of the 13th of *October*, inclosed the bills of lading, which were filled up with the words "*with convoy*." The defendant contended that if these letters had been communicated, he should have known from the ship's not being included in the convoy-list at *Lloyd*'s, that she was a missing ship. Lord *Ellenborough* C. J. stated to the jury, that the question was whether a disclosure of these letters would probably have varied the judgment of the underwriter, so as to have induced him either to decline subscribing the policy, or to demand a higher premium; that if such might have been the consequence of a disclosure of them, they were material letters to be communicated. The jury found a verdict for the plaintiffs.

Taddy in the last term obtained a rule nisi for a new trial, renewing as an objection to the verdict, the ground of defence that was relied upon at the trial.

Park and *Parnther* now shewed cause, and contended, 1st, that the whole question having been left to the jury, they were at liberty under the circumstances to presume that the letters were communicated to the underwriter; for in the absence of all fraud, which was not imputed to the plaintiffs, the jury might infer that the usual enquiries and communications were made at the time of effecting the policy. [Lord *Ellenborough* C. J. observed that he did not leave the question to the jury, whether the letters were communicated to the underwriter, because the admission read at the trial precluded all such presumption without further proof.] They then contended

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tended that the letters were not material, ſo as to render a communication of their contents to the underwriter neceſſary; for they amounted merely to matter of expectation: the expreſſion in the firſt letter that the captain *pretends* to ſail to-morrow, amounted to this only, that he expects to ſail; and it was held in *Barber* v. *Fletcher* (*a*), that a repreſentation that a ſhip was *expected* to ſail, would not vitiate the policy though it afterwards turned out that ſhe had ſailed long before. [*Bayley* J. In *Willes* v. *Glover* (*b*), a letter to this effect, "I think the captain will ſail to-morrow," was conſidered as material.] The jury under the circumſtances did not think this letter ſo.

The Solicitor-General and *Taddy*, contrà, maintained that there was no neceſſary inference ariſing from the ordinary courſe of buſineſs, to authorize the jury in preſuming that the letters were communicated. It is as uſual for an underwriter to ſubſcribe a policy without making enquiry, as after enquiry made. Aſſuming then that there was no diſcloſure, it is clear that the letters contained intelligence, on which the defendant ought to have had an opportunity of exerciſing his judgment; and therefore they ought to have been diſcloſed: and though the jury may have found their verdict on the ground that the letters were not material, yet if the Court think otherwiſe, according to the caſe of *Willes* v. *Glover*, they will grant a new trial.

Lord ELLENBOROUGH C. J. Under the terms of the admiſſion, we cannot preſume that any communication

(*a*) *Doug.* 305. (*b*) 1 *N. R.* 14.

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took place between the parties beyond that diſcloſed by the terms of the policy, which contained the deſcription of the voyage, and the amount of the ſubſcription. Nor is it very unlikely that the underwriter ſhould ſubſcribe his name without making further enquiry; becauſe he knows at the time that if any material fact be withheld, his ſubſcription will not be obligatory upon him; but that the loſs will ultimately fall on the party who has been guilty of the concealment: and therefore he enters into the contract in full confidence of having all circumſtances diſcloſed to him, the concealment of which might be fatal to the intereſts of the aſſured. The only queſtion then is, whether the letters of the 11th and 13th of *October* were material letters to have been diſcloſed to the underwriter; for although no fraud is imputed to the plaintiffs in withholding them, ſtill that will not help them, provided they were bound to make the diſcloſure. Now the letter of the 11th would have made known to the defendant the captain's intended time of ſailing; and from that of the 13th, incloſing the bill of lading, he would have learned facts which were certainly important; viz. that the ſhip's lading was completed on that day, and that ſhe was to ſail with convoy. The defendant then might have referred to the convoy-liſt at *Lloyd's*, and would have there found that the convoy had arrived without her, and from that circumſtance muſt neceſſarily have inferred a diſappointment in the original intention of the parties. Now if that was a circumſtance which might have made the underwriter pauſe before he ſubſcribed his name, or have induced him to demand a higher premium, it was very material that it ſhould have been communicated to him. I do not obſerve that this was more than the ordinary premium for

ſuch riſks; if it had been higher, I ſhould have thought it an important circumſtance; but as the caſe now ſtands, I cannot help thinking theſe letters were material. It was a queſtion certainly for the jury, and was left to them as ſuch; but ſtill if this Court has reaſon to think that they came to a wrong concluſion upon it, we may ſet it right, as was done in *Willes* v. *Glover*, by ſending the caſe down to another enquiry.

GROSE J. I am of the ſame opinion, and think that the letters were material, becauſe a communication of their contents might have made the riſk of the underwriter appear different from that which he conceived it to be in the abſence of ſuch communication, and at all events would have led him to make further enquiries. It is not the leſs a concealment becauſe made without any view to fraud, if in effect it operates to the prejudice of the underwriters.

LE BLANC J. If the jury, in the concluſion which they drew from the evidence, inferred that more was communicated to the underwriter than was proved, it would be againſt the terms of one of the admiſſions made at the trial, and that alone would be a ground for ſetting aſide their verdict. But without ſuppoſing that, and taking the queſtion ſimply upon the materiality of the two letters, I believe it has always been conſidered that the time of the ſhip's ſailing, if known to the aſſured, is a material fact to be communicated to the underwriter. Here the aſſured were in poſſeſſion of a letter from their correſpondents, ſtating that they were loading the wines aboard, and the captain would ſail after to-morrow; and of another letter alſo, incloſing

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the bills of lading, which professed that she was to sail with convoy. Can the Court then say, consistently with what has hitherto been considered as the law, that this intelligence respecting the time and manner of the ship's sailing was immaterial. I think it would be extraordinary to hold such a doctrine, especially in a case where it appears that if the intelligence had been communicated, the ship might have been known upon search by the underwriter to have been a missing ship. He would have been a little staggered at finding a convoy, which arrived on the 30th of *October*, did not include a ship which was to sail with convoy on the 13th.

BAYLEY J. No inference arises from the amount of the premium, that any disclosure which made the risk more than an ordinary one, was made to the underwriter; and if it had, a bill in equity might have been filed last term, which would have furnished the evidence of it. As to the materiality of the letters, there can be no doubt the underwriter would have learnt from them that the ship was to sail on the 13th of *October* with convoy, and that an interval had elapsed during which the convoy had arrived without her. In *Barber* v. *Fletcher*, it is clear that the representation of the broker to the underwriter as to the ship's expected time of sailing, could not have been made by him, as founded upon any letter written by a person who was on the spot where the ship was; and the underwriter did not inquire into the ground of the expectation: it might therefore perhaps be considered as immaterial.

Rule absolute (*a*).

(*a*) See 1 *Esp. Rep.* 373, *M'Andrew* v. *Bell*. Ibid. 407. *Webster* v. *Foster*.

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CUFF and Others *againſt* PENN.

Monday, Jan. 25th.

IN an action of aſſumpſit for not accepting a quantity of bacon, the caſe was this: the plaintiffs having offered to ſell the defendant 300 hogs of bacon, the defendant on the 10th of *April* 1807, wrote to the plaintiffs the following letter: "Meſſrs. *Cuff*, *Dickinſon*, and *Cuff*, I agree to accept your offer of 300 hogs of bacon, to be delivered at ſuch times and in ſuch quantities as mentioned beneath, at 69*s.* per cwt., each parcel to be paid for at two months after delivery; viz.

"*April*	20th	- -	25 hogs.
May	10th	- -	25
	20th	- -	25
June	10th	- -	50
	24th	- -	50
July	14th	- -	50
	24th	- -	50
Aug.	10th	- -	25
			300

J. Penn."

On the 21ſt of *April*, (and not on the 20th, as ſtipulated by the contract,) the firſt delivery was made; but it appeared that the defendant did not make any objection on that ground. After the third delivery, viz. on the 5th of *June*, the defendant wrote to the plaintiffs, informing them that he ſhould want the next delivery of bacon as ſoon as it could be got ready. On the 10th of *June* the defendant attended at the plaintiffs' warehouſe, and 84 ſides were then weighed in his preſence; and *on the 2d of July he again called on the plaintiffs, and told them, as*

Where the defendant agreed *by a written contract* to purchaſe of the plaintiffs 300 hogs of bacon, to be delivered at fixed times and in ſpecified quantities, and after a part of the bacon had been delivered, requeſted the plaintiffs, as the ſale was dull, not to preſs the delivery of the reſidue; to which the plaintiffs aſſented: this was to be underſtood only as a *parol* diſpenſation of the performance of the original contract, *in reſpect to the times of the delivery*, and therefore was not affected by the ſtatute of frauds: the defendant was held liable for not accepting the reſidue within a reaſonable time afterwards.

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the ſale of bacon was very dull, he hoped that they would not preſs it on him; and they aſſured him they would not: 84 *ſides were weighed at this time*; and a further quantity was weighed on the 10th of *July*. The plaintiffs having forborne to deliver any more bacon for ſome time, at length informed the defendant that he had exceeded a reaſonable time, and requeſted him to name a time for delivery. This the defendant declined, obſerving that the ſales were very dull. Similar applications having been afterwards made to the defendant without effect, the plaintiffs on the 28th *September* wrote to the defendant, informing him "that on the 30th inſtant the remainder of the bacon would be weighed at their warehouſe, and that he might ſee it weighed if he thought proper; if not, they ſhould weigh it off, and deliver it to him in the courſe of that day." After the receipt of this letter, the defendant called on the plaintiffs, and ſaid there was no contract; to which they anſwered, that they had his hand-writing, and ſhould inſiſt on the contract; the defendant replied there was no uſe in ſending the bacon, as he would not take it. On the 30th of *September* the remainder of the bacon was weighed and ſent to the defendant's houſe, but he refuſed to receive it. In the firſt count of the declaration, the contract was ſtated according to the terms of the defendant's letter of the 10th of *April*; and the declaration then averred that the plaintiffs delivered a part of the bacon which was accepted and paid for by the defendant under the contract; and that the plaintiffs offered to deliver the reſidue; but the defendant would not accept the ſame. In the ſecond count, after ſetting forth the contract of the 10th of *April*, it was averred that the plaintiffs had delivered a certain quantity of bacon, which was accepted

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cepted by the defendant, and that the plaintiffs intended and were about to deliver the reſidue under the contract, but the defendant, on the 2d of *July* 1807, diſcharged the plaintiffs from ſuch delivery, and requeſted them not to deliver any more bacon until further orders from the defendant, which the plaintiffs agreed to do; and thereupon in conſideration of the premiſes, and alſo in conſideration that the plaintiffs had agreed to deliver the reſidue of the bacon, according to ſuch orders within a reaſonable time, the defendant promiſed to give ſuch orders, and accept the reſidue of the bacon within a reaſonable time, and to pay for the ſame according to the terms of the original contract: that on the 30th *September* 1807 the plaintiffs offered to deliver the reſidue, which the defendant refuſed to accept. The third count was ſimilar to the ſecond, except that it ſtated that the defendant requeſted the plaintiffs to poſtpone the delivery of the reſidue of the bacon for a reaſonable time.

At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term, it was objected on the part of the defendant that this was a written contract for the ſale and purchaſe of goods, and could not be varied by parol; but if the ſubſequent parol agreement was to be conſidered, not as varying the written contract, but as ſubſtituting a new one in its place; then it was void by the ſtatute of frauds, there being neither a part acceptance nor a part payment under it. But his Lordſhip was of opinion that this was a diſpenſation only with the performance of the original contract in reſpect of the delivery of the bacon at the ſtipulated times; and directed the jury to find a verdict for plain-

1813. tiff, with liberty to the defendant to move to enter a nonſuit; a verdict was accordingly given for the plaintiffs upon the ſecond and third counts; and *Marryat* in the laſt term obtained a rule niſi for entering a nonſuit.

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The Solicitor-General, *Park*, and *Lawes* now ſhewed cauſe, and contended that the ſtatute of frauds (*a*) only required that the contract of ſale ſhould be in writing; not that the contract for delivery ſhould be ſo; in this caſe there was a written contract of ſale; and the poſtponement of the delivery was in the nature only of an enlargement of the time for performing it. In *Warren* v. *Stagg* (*b*), cited in *Littler* v. *Holland* (*c*), *Buller* J. held that an agreement to extend the time for the performance of a contract, was not a waver but a continuation of the original contract; and it never occurred in that caſe that there was any neceſſity for written evidence of ſuch agreement. Here the declaration contains counts on the original agreement, as well as on the agreement to poſtpone the delivery of the reſidue of the bacon; and even admitting that a delivery was neceſſary under this latter agreement to conſtitute a part acceptance within the terms of the ſtatute, the weighing out the 84 ſides amounted to a delivery: it would have been a good tranſfer of the property to the vendor in the ordinary caſe of ſale and purchaſe; ſo that if a fire had happened afterwards, according to the authority of *Rugg* v. *Minett* (*d*), the loſs would have fallen on the purchaſer.

(*a*) 29 *Car.* 2. *c.* 3. *ſ.* 17.
(*b*) 3 *T. R.* 591.
(*c*) Ibid.
(*d*) 11 *Eaſt*, 210.

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Marryat and *Gurney*, contrà. The second class of counts, upon which the verdict was taken, cannot be sustained under the statute of frauds. The original contract was an entire contract as to price, quantity, and the times of delivery; and parol evidence varying the original contract in any of these respects ought not to be received. It would be as dangerous in its consequences to allow parol terms to be engrafted upon a written contract, as to allow a parol contract to be enforced in the first instance. Parol evidence, offered for the purpose of connecting two written instruments not having an immediate or necessary reference to each other, has been refused (*a*), and the attempt in the present case goes one step further than that; for it is an attempt to connect by parol evidence a written and a parol contract. In *Powell* v. *Divett* (*b*), *Bayley* J. said, that "without a written contract the case would be within the statute of frauds; and the mischief would be the same, if parol evidence were let in to shew how much of the contract was good and how much bad." The time of delivery in this case is as essential as the price or the quantity; for there is a greater demand for the article at one season than at another. Is it competent then to the party to vary the time by parol? This would let in all the inconveniences which were intended to be obviated by the statute of frauds. If new times may be substituted, so may new prices or new quantities. As to the case of *Warren* v. *Stagg*, no question was there made upon the statute of frauds; the only question was whether the contract proved was different from that laid in the declaration:

(*a*) *Boydell* v. *Drummond*, 11 *East*, 142. (*b*) 15 *East*, 32.

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ration: and *Littler* v. *Holland* is contrary. That indeed was an action of covenant; but Lord *Kenyon* there cited the case of an action between *Garrick* and *Barry*; where the Court held that articles of agreement, which did not appear to be under seal, could not be dispensed with by parol.

Lord ELLENBOROUGH C. J. I think this case has been argued very much on a misunderstanding of the statute of frauds, and the question has been embarrassed by confounding two subjects quite distinct in their nature; namely, the provisions of that statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract. The principal design of the statute of frauds was that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase. But by the express provisions of that statute it is only necessary, in order to make a contract for the sale of goods binding upon the parties, that there should be either a note or memorandum of the bargain in writing; or if there be no writing, that there should be a part-payment by way of earnest, or a part-acceptance of the goods. In the present case there exist two indicia pointed out by the statute, viz. a contract for sale in writing, and a part-performance, so that not only the literal intention but the spirit also of the statute is satisfied. The objection then does not found itself upon a non-compliance with the provisions of that statute, but is more properly this; that an agreement once made in writing cannot be varied by parol. If this agreement had been varied by parol, I should

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ſhould have thought, on the authority of *Meares* v. *Anſell* (*a*), that there would have been ſtrong ground for the objection. But here what has been done is only in performance of the original contract. It is admitted that there was an agreed ſubſtitution of other days than thoſe originally ſpecified for its performance: ſtill the contract remains. Suppoſe a delivery of live hogs inſtead of the bacon had been ſubſtituted and accepted, might not that have been given in evidence as accord and ſatisfaction. So here the parties have choſen to take a ſubſtituted performance. It is clear that neither of them in the outſet thought it neceſſary to ſtand on the letter of the agreement; for the firſt delivery was to have taken place on the 20th of *April*, and was not made until the 21ſt, and yet no objection was then taken. Afterwards a new mode of delivery is ſubſtituted at the defendant's expreſs requeſt. I am of opinion therefore that neither has the ſtatute of frauds been trenched upon; nor has any rule of law reſpecting parol evidence not being admiſſible to vary a written agreement been violated in this inſtance.

Per Curiam, Rule diſcharged.

(*a*) 3 *Wilſ.* 275.

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Monday, Jan. 25th.

Elford and Others *against* Teed.

A presentment of a bill of exchange at a banking-house after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before duly presented within banking hours.

ACTION by the plaintiffs as indorsees of a bill of exchange against the defendant as drawer, and upon the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, the defence was that the bill had not been duly presented for payment; as to which it appeared that the bill was accepted payable at Messrs. *Hodsoll* and Co., who were bankers in *London*; and that on the day when it became due, a witness who was clerk to a notary, carried it to the banking-house of *Hodsoll* and Co., for presentment, between half-past six and seven o'clock in the evening; that he found the banking-house shut, and then went to the private house door, and there saw a female servant, who returned for answer, No orders. The jury, under the direction of his Lordship, found a verdict for the plaintiffs; and the defendant had liberty to move to enter a nonsuit, which rule was accordingly obtained by *Taddy* in the last term on the authority of *Parker* v. *Gordon* (*a*).

The Solicitor-General and *Marryat*, who now shewed cause, contended that the jury might have reasonably inferred, (as the case was, though they were not in a condition to prove it at the trial,) from the circumstance of the bill having been carried for presentment after banking hours by a notary's clerk, who was not the usual person to present bills in the first instance, that it had been before presented during banking hours;

(*a*) 7 *East*, 385.

and

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and that the whole of those hours had been allowed the acceptor of the bill to discharge it, according to the universal practice of banking houses, at the expiration of which time the notary made his presentment. This distinction they said was not adverted to in *Parker* v. *Gordon*, which was decided on the ground of there having been no other presentment than that made by the notary.

Lord ELLENBOROUGH C. J. said that there was no ground for the jury to presume that which was so easily capable of proof; and that the case of *Parker* v. *Gordon* was not distinguishable from the present, and that case was conformable with the doctrine which he had usually held. There was not any text-writer upon whose authority a presentment of a bill by a notary at a house of business after it was closed, could be sustained. It is laid down in *Marius* (*a*), that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy to the horæ juridicæ of the courts of justice.

The rest of the Court concurred.

Topping and *Taddy* for the defendant, prayed that a nonsuit might be entered: but the Court only made the rule absolute for a new trial on payment of costs by the plaintiffs, in order that they might have an opportunity of proving a prior presentment.

(*a*) *Marius*, 2nd *Ed.* 187.

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Tueſday, Jan. 26th.

THOMSON *againſt* the ROYAL EXCHANGE Aſſurance Company.

An aſſured on bottomry cannot recover againſt the underwriter unleſs there has been an actual total loſs of the ſhip: for if the ſhip exiſt in ſpecie, in the hands of the owners, though under circumſtances that would entitle the aſſured on the ſhip to abandon, it will prevent its being an utter loſs within the meaning of the bottomry bond.

THIS was an action on a policy of aſſurance on bottomry, at and from *St. Chriſtopher* to *London*, tried before Lord *Ellenborough* C. J. in *London*, at the ſittings after laſt *Michaelmas* term: when it appeared that the ſhip ſailed on the voyage inſured; in the courſe of which ſhe encountered ſuch tempeſtuous weather as to become totally diſabled, and to have narrowly eſcaped foundering at ſea; but falling in with a king's ſhip, was taken in tow by her and brought into *Falmouth*. A ſurvey was made of the ſhip's ſtate at that place, and of the expences neceſſary for her repair, when it was found that they would amount to 3200*l.*; and that after their completion ſhe would be worth only 2000*l.*: the owners therefore determined to break her up and ſell her at *Falmouth*; and her hull was accordingly ſold for 300*l.*, and her ſails and ſtores for 400*l.*; her value at the period when ſhe left *St. Chriſtopher* having been 4000*l.* Theſe circumſtances it was contended amounted to an utter loſs within the meaning of the condition of the bottomry bond: but Lord *Ellenborough* C. J. being of a different opinion directed a nonſuit to be entered.

Gurney now moved to ſet aſide the nonſuit, contending that the circumſtances proved at the trial ſhould have been left to the jury, with a direction to find a total loſs: it appearing from the ſurvey made of the ſhip that ſhe was neither capable of continuing her voyage, nor of remaining any longer in exiſtence as a ſhip,

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THOMSON *against* The ROYAL EXCHANGE Assurance Company.

ſhip, without incurring expences which would greatly exceed her value; and from neceſſity ſhe was broken up, while the voyage was yet incomplete: by which means the condition upon which the ſum borrowed was made payable had failed, and therefore the inſurer was liable.

Lord ELLENBOROUGH C. J. This was not a queſtion, whether ſuch a loſs had happened as in the caſe of an inſurance on the ſhip, might have entitled the aſſured to abandon; but whether it was an utter loſs within the true intent and meaning of the bottomry bond. The diſtinction between an inſurance upon the one and the other is ſimple: in the former caſe if the voyage be loſt, or not worth purſuing, or the ſhip be reduced to ſuch a ſtate that ſhe cannot proceed without refitting, the expence of which would greatly exceed her value, the aſſured may abandon and claim as for a total loſs; but in the latter caſe as nothing ſhort of an actual total loſs will diſcharge the borrower of money upon bottomry, ſo nothing leſs will render the inſurer liable. Here the thing continued to exiſt as a ſhip, her hull and bottom remained, though perhaps in ſuch a ſtate as might make it prudent for the owners to diſpoſe of her. I have had occaſion at the cockpit to ſtate this diſtinction as eſtabliſhed law; that in the caſe of bottomry nothing ſhort of a total deſtruction of the ſhip will conſtitute an utter loſs; if it exiſts in ſpecie, in the hands of the owner, it will prevent an utter loſs.

Per Curiam, Rule refuſed.

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Tuesday, Jan. 26th.

The KING *against* The STAINFORTH and KEADBY Canal Company.

The Court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act of parliament, to proceed to an assessment, of the value of land taken by them for the purposes of their canal; and also of the recompence to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the Court within a reasonable time after the land was taken by the company; especially if the parties have another remedy by ejectment.

HOLROYD moved for a rule nisi for a mandamus to the defendants, directing them to call a meeting of the commissioners appointed by an act of parliament of the 33 *G.* 3. *c.* 117. (*a*), for making and maintaining a navigable canal from the river *Dunn* navigation cut to communicate with the river *Trent*, &c., in order that the said commissioners should issue a warrant to the sheriff of the county of *York*, to summon a jury pursuant to the said act, to assess the sum or sums of money, or annual rent, to be paid for the purchase of certain land late belonging to Lady *Irwin*, deceased, and now to the Marquis and Marchioness of *Hertford*, in right of the Marchioness, taken by the said company for the purposes of the said canal, and the recompense to be made for the damages that have been sustained thereby by the said Lady *Irwin* and the said Marquis and Marchioness.

(*a*) By certain provisions of the above act commissioners are appointed for settling differences between the canal company and the proprietors of lands who are impowered by writing to ascertain either by an annual rent or by a sum in gross the value of the purchase of the lands set out for making the canal, and also the recompense for damages sustained; and if the parties are dissatisfied with their determination to issue a warrant to the sheriff of the county where the lands lie, to summon a jury to assess such value or recompence; and it is provided also that upon payment or tender of such sum as the commissioners shall ascertain or the jury assess, the company may take possession of the lands; and that upon further recording the determination of the commissioners or the verdict of the jury at the sessions the land shall vest in the company, and that until such sum is paid or tendered the company shall not be impowered to enter.

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It appeared by the affidavits on which the rule was prayed, that in the year 1799 the canal company took the land in queſtion, amounting to about ſeven or eight acres, of which Lady *Irwin* was then tenant for life, and the Marchioneſs of *Hertford* afterwards became ſo at her deceaſe, and converted it to the purpoſes of their navigation. At that time they made a valuation of the land without giving any notice of it to Lady *Irwin*; nor did they make any tender of the money at which they valued it during her life, but in 1806 her agent attended at a meeting of the company, and delivered in his claim at the rate of 30*l.* per acre above their valuation. In 1807 Lady *Irwin* died, and in *April* 1810 the agent of the Marquis made various applications to the company, for ſettling the price due for the ſaid land; to one of which, in *July*, he received for anſwer, that they would conſider the claim and communicate the reſult; which they did ſhortly afterwards by incloſing an order, made at a general meeting, for tendering the price of the orignal valuation and intereſt thereon, and if it was refuſed, the company declared they would abide the legal conſequences. This valuation was ſworn to be very far ſhort of the real value of the land.

Holroyd contended that in order to proceed to a due valuation, according to the act, it was neceſſary to have a meeting of the commiſſioners; and that ſuch meeting could only be compelled by means of a mandamus, which was therefore the proper remedy in this caſe. He ſaid, that it was true the company by taking poſſeſſion of the land before a due aſſeſſment was made, and the ſum aſſeſſed was paid or tendered by them, which by the act are made conditions precedent to their

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taking poſſeſſion, had made themſelves treſpaſſers, and therefore ejectment would lie againſt them; but that would be an inconvenient remedy, which might ouſt the public of land that is now dedicated to their uſe.

Lord ELLENBOROUGH C. J. Why was not this application made earlier? the cauſe of complaint originated as far back as the year 1799; and there is nothing ſtated to the Court to account for the delay. Since that time, no doubt, changes have taken place in the company's property, and many of the ſhares have got into other hands who were no parties to this tranſaction. I therefore think that this application comes too late, and remember a caſe not very long ago, in which Lord *Sheffield* was concerned, where the Court refuſed to entertain a ſimilar motion on account of the length of time that had been ſuffered to elapſe. Here there is another remedy by ejectment, which, if purſued, may perhaps lead to ſome compromiſe.

GROSE J. It might be injurious to thoſe who have become purchaſers of this property ſince the year 1799, to grant this rule.

LE BLANC J. If we were to grant the rule it muſt be to make an eſtimate of what was the value of the land as long ago as 1799.

Per Curiam, Rule abſolute.

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GLADSTONE and Another *against* KING.

Tuesday, Jan. 26th.

Where the plaintiffs on 25th *October* 1811 effected an insurance on ship at and from her port of loading to her port of discharge, and it appeared that on the 25th of *July* preceding, the ship whilst in her port of loading was driven on a rock by a storm, but got off without appearing to have suffered material damage; and the captain afterwards wrote a letter to the plaintiffs without communicating the accident; which letter reached them on the 5th of *October;* and the ship afterwards arrived at her port of discharge, where the captain made a protest detailing the accident, and stating that the plank of her bottom must have been chafed, and her bottom otherwise injured by striking on the rock: Held, that the plaintiffs could not recover as for an average loss arising from the accident; for the captain was bound to communicate the accident, and for want of such communication, the antecedent damage was an implied exception out of the policy: and the policy not being made void, the plaintiffs could not recover back the premium.

THIS was an action on a policy of assurance made the 25th *October* 1811, on the ship *Richard*, lost or not lost, at and from the vessel's port of loading in *Jamaica*, to her port of discharge in the united kingdom. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, it appeared from the admissions, that on the 15th of *July* 1811 the ship arrived in *Manchineal* harbour, in *Jamaica*, for the purpose of taking in her cargo; of which circumstance the captain apprized the plaintiffs, (her owners,) by letter of that date; on the 25th, whilst the ship was lying in the harbour, a storm came on which drove her from her moorings, and she struck upon a rock, but by the exertion of the ship's company was got off again without appearing to have suffered any material damage. On the 5th of *August* the captain wrote home to the plaintiffs, but did not make any mention of this accident in his letter, which reached the plaintiffs on the 5th of *October* following. The ship having completed her loading, proceeded on her voyage, and arrived at the *West India* Docks on the 6th of *January* 1812, and afterwards discharged her cargo undamaged: and on the day of her arrival the captain made a protest, in which he detailed the accident that happened to her on the 25th of *July*, but added, that she prosecuted her voyage home without

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exhibiting any bad effects from the accident; although the planks of her bottom muſt have been chafed, and her bottom otherwiſe injured by ſtriking on the ſaid rocks. This was the firſt intimation given to the plaintiffs of the accident. A ſurvey was afterwards made, when it was diſcovered that the ſhip, in conſequence of having run aground, had ſuſtained damage in her keel and other parts to the amount of about 15 per cent., which damage the plaintiffs ſought by this action to recover.

Upon this evidence it was objected that the captain ſhould have informed his owners, by his letter to them of the 5th of *Auguſt*, of the accident which had happened to the ſhip on the 25th of *July*; which if he had done, the information would have reached them in time to have communicated it to the underwriters, to whom it was material that it ſhould have been communicated. Lord *Ellenborough* C. J. was of opinion that the captain, as agent for the owners, was bound to communicate to them what he knew might be a cauſe of damage to the ſhip, and that his omiſſion in this reſpect, by means of which the owners were prevented from diſcloſing the accident to the underwriters, operated as an exception of that particular riſk out of the policy; and he therefore directed a nonſuit.

Scarlett now moved to ſet aſide the nonſuit, upon the ground that the plaintiffs were entitled to recover either for an average loſs, or for a return of premium; either the policy attached notwithſtanding the concealment, and then they ought to have recovered upon the loſs; or the concealment was material, and the policy void, and then they were entitled to a return of premium.

He

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He contended that the policy attached notwithſtanding the concealment, and that the captain was not bound to inform his owners of every accident which happened, unleſs it was of ſuch a nature as to cauſe an apparent damage or a probability of damage to the ſhip: the mere poſſibility that ſhe may have ſuffered from any accident is not enough to make the diſcloſure of ſuch accident neceſſary, for if it were, the captain would be bound to write home by every poſt reſpecting the moſt trivial occurrences. Here it is admitted that the captain was not aware of any injury ſuſtained; and it is not imputed to him that he kept back any information from his principals in order to make them the inſtruments of effecting a fraud on the underwriters; if he had not written at all after the accident it does not follow that the inſurance would have been void. His omitting therefore to communicate the accident when he did write, which cannot amount to more than not writing at all, will not vitiate the policy. But if the policy attached, it is a new principle in inſurance-law that it may do ſo for ſome purpoſes, and not for others; and that the want of a diſcloſure of any particular circumſtance, which does not amount to ſuch a concealment as will vitiate the policy, may yet amount to an exception of the riſk ariſing out of that particular circumſtance.

Lord ELLENBOROUGH C. J. With reſpect to the queſtion, whether the captain was bound to tranſmit to his owners intelligence of the accident which happened to the ſhip on the 25th of *July*, I think that if it were but a dubious cauſe of damage, he ought to have communicated it; but looking at the circumſtances as diſ-

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closed afterwards by the captain's protest, must we not say that they amount to something more than a dubious cause, and that there is pregnant evidence that the captain suspected the ship must have sustained some damage, though he might not know what the particular damage was? If then the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy, would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew and might have actually communicated to the plaintiffs the cause of damage, so as to have apprized them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment, will not alter the case as we had occasion to determine yesterday (*a*). I do not remember that the point respecting the return of premium was made at the trial; but if it was, the answer to it must have been that this is not the case of a void insurance, but only of an exception out of the policy.

LE BLANC J. The antecedent damage which the captain was bound to communicate to his owners, and

(*a*) *Bridges* v. *Hunter*, *ante* 15.

neglected

neglected ſo to do, may be conſidered as an implied exception out of the policy; and the opinion which my Lord held at the trial muſt have precluded the plaintiffs from demanding the premium.

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GLADSTONE *againſt* KING.

The other Judges concurred.

Per Curiam, Rule refuſed.

SIFFKEN *againſt* ALLNUTT.

Tueſday, Jan. 26th.

THIS was an action upon two policies of inſurance, the firſt of the 18th of *Auguſt* 1811, ON WHEAT, by the ſhip *Anna Maria*; the ſecond of the 24th of *Sept.* 1811, on money advanced to the captain at *Archangel*, "loſt or not loſt," at and from *Archangel* to *London*. The loſs declared upon was by capture. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term, it appeared that the ſhip with her outward cargo ſailed from *London* in *June* 1810, under a licence which the plaintiff had procured on the 25th of *May* preceding. The licence was granted "to *Henry Siffken* for the *Anna Maria* to take a cargo of *Britiſh* and *Eaſt India* goods at *London*, and proceed to *Newcaſtle*, and thence to *Archangel*, and to return thence with a cargo of grain and

Where a licence was granted to the plaintiff on the 25th of *May* 1810, to take a cargo from *London* to *Archangel*, and to return from thence with a cargo of grain and other goods permitted by law to be imported to any port of the United Kingdom, and the licence was limited to the 29th of *September* following, which time was afterwards extended to the 1ſt of *January* 1811, and the ſhip after taking in a cargo of pitch and tar at *Archangel*, ſailed on her homeward voyage on the 13th of *October* 1810, but was driven back to *Archangel*, and there unloaded, and her cargo ſold, and the ſhip laid up for the winter, and did not ſail again from thence with a cargo of wheat until the firſt of *Auguſt* 1811: Held, that the licence was not exhauſted by taking in the firſt cargo of pitch and tar, but would cover the cargo of wheat alſo, notwithſtanding the time limited for its continuance had elapſed, provided it appeared that the voyage was proſecuted with all reaſonable diſpatch, which was a queſtion for the jury; and therefore if it ſhould ſo appear, an inſurance effected by the plaintiff on the 18th of *Auguſt* 1811, on wheat at and from *Archangel* to *London* would be valid, and would attach on the wheat cargo; but an inſurance on money advanced to the captain at *Archangel* was void, and upon that the plaintiff might recover back the premium.

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other goods permitted by law to be imported, to any port of the United Kingdom." This licence was to remain in force until the 29th of *September* 1810, which period, by a general order in council, applicable to all licences, was extended to the 1ſt of *January* 1811. The ſhip arrived at *Archangel* in *September* 1810, and on the 2d of *October* diſcharged her outward cargo, and afterwards took in her homeward cargo, which conſiſted of pitch and tar, and on the 13th of *October* ſailed on her homeward voyage. A few days afterwards the froſt ſet in, which obliged her to put back to *Archangel*, and in conſequence of ſome damage ſhe had ſuſtained from another veſſel having run foul of her, it became neceſſary to unload her cargo; and the pitch and tar were accordingly unloaded and ſold at *Archangel*. The ſhip lay there during the winter, and when the froſt broke up in *May* 1811, underwent ſome repairs; and on the 16th of *July* took aboard a cargo of wheat, and on the 1ſt of *Auguſt* again ſailed on her homeward voyage; in the courſe of which on the 16th of the ſame month ſhe was captured by the *Danes*. It alſo appeared that on the 25th of *March* 1811, the plaintiff had procured another licence to continue for ſix months, permitting the *Anna Maria* to proceed from *Archangel* to *Leith*. Upon the firſt policy Lord *Ellenborough* C. J. was inclined to think that it was not intended to cover two ſucceſſive cargoes, but only one; and therefore that the policy never attached on the ſecond cargo: and on the other policy his Lordſhip held that the inſurance was void; and he allowed the plaintiff to recover the amount of the premium on both the policies, with liberty to the defendant to move to reduce the verdict to the amount of the premium on the ſecond policy.

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Park accordingly obtained a rule nisi in last *Michaelmas* term for so reducing the verdict, or for a new trial, contending on the authority of *Lowry* v. *Bourdieu* (*a*), and *Vandyck* v. *Hewitt* (*b*), that the plaintiff could not recover back the premium on the first policy, inasmuch as the voyage insured was illegal, there not being any period when it was protected by the licence. [Lord *Ellenborough* C. J. said, that supposing the licence to have expired, still perhaps there might be a distinction between the case of an illegal insurance and this case; where it was evident the party contemplated a legal voyage by procuring the licence.]

The Solicitor-General and *Holroyd*, who now shewed cause, contended that at all events the plaintiff was entitled to retain the verdict for the premium on the first policy, because the voyage insured was protected by the licence, and therefore not illegal; but secondly, they contended that the plaintiff ought to have been further allowed to recover upon the loss, because the policy attached on the second cargo. On the first point, they maintained that the licence, notwithstanding the time specified for its continuance had elapsed, would yet enure to protect the voyage, for the Court would construe it according to its fair meaning and import, rather than according to its strict letter; and in this respect it resembled a policy of assurance or any other commercial instrument. It is material to observe that this was a licence not for an unnamed adventure or an indefinite cargo, but for a voyage declared out and home, and for a cargo specified as a cargo of grain; and the words

(*a*) *Doug.* 467. (*b*) 1 *East*, 96.

limiting

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limiting its duration to the 29th of *September* are printed, and are therefore to be taken in a ſenſe leſs ſtrict than if they were written. The object then of the licence was rather to protect a ſpecific adventure than to limit a ſpecific time; and to hold that the adventure muſt be concluded on the 29th of *September*, would be to defeat the meaning of the licence by a ſtrict adherence to its letter. It was inconſiſtent with the nature of the voyage that it ſhould terminate within the time ſpecified; which muſt therefore be intended ſuch a reaſonable time as, allowing for the accidents of climate, would be ſufficient for the completion of ſuch a voyage. This was ſo laid down by Lord *Ellenborough* C. J. in *Schroeder* v. *Vaux* (*a*), and the Court of Common Pleas yeſterday confirmed that doctrine in the caſe of *Siffken* v. *Glover*, by refuſing a rule for a new trial in an action brought upon this ſame policy, being of opinion that there was not any unreaſonable delay. [Lord *Ellenborough* C. J. ſaid that by limiting the period of the licence, it certainly was in the contemplation of the crown, that the voyage ſhould be proſecuted with all convenient ſpeed; but he had uniformly held that the licence ſhall not become void by the mere efflux of time, if the voyage be duly commenced and proſecuted within a reaſonable time.] Upon the ſecond point they obſerved that this policy, like the licence, was not a general policy, but upon a ſpecific cargo and voyage; and they relied on the arguments already uſed upon that point in ſupport of the licence, to ſhew that the policy alſo attached on the wheat cargo.

Park and *Campbell*, contrà, denied that the caſe in the Common Pleas decided either of the queſtions now be-

(*a*) 15 *Eaſt*, 53.

fore

fore the Court, the queſtion there being upon the ſecond licence; and maintained that this licence being expreſsly limited to one cargo as well as to a time certain, was exhauſted by the cargo of pitch and tar, and could not be extended beyond the expreſs terms of it to a ſecond cargo. Admitting that the accidents of the voyage may create ſuch an inevitable delay as may juſtify an extenſion of the licence beyond the preciſe period limited, it is not ſo with reſpect to a change of cargo; otherwiſe a licence granted for one cargo only might be extended to any number that the ſpeculation of the party licenſed might require. In *Schroeder* v. *Vaux* there was no change of cargo, and even with reſpect to the extenſion of the time in that caſe, it is obſervable that the adventure had ſubſtantially commenced before the licence expired, by the loading of the goods on board within the time preſcribed. That is not ſo here with reſpect to the wheat cargo, which was a new adventure begun after the licence had been ſatisfied by a former cargo, and after the licence itſelf was no longer in force. In this view of the caſe it is immaterial to diſcuſs, ſecondly, whether the policy attached on the wheat cargo; for if there was no licence at the time when it was effected, the inſurance was illegal.

Lord ELLENBOROUGH C. J. In this caſe two queſtions have been made, the firſt, whether any thing has been done in fraud of the licence. For the determination of that point, it is material to conſider what the licence authorizes. It authorizes the taking in a cargo of *Britiſh* and *Eaſt India* goods at *London*, and proceeding to *Newcaſtle* and thence to *Archangel*; it does not, however, ſtop

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ſtop there, but it goes on to permit the return from *Archangel* with a cargo of grain and other goods permitted by law to be imported into any port of the United Kingdom. The cargo of pitch and tar came within the terms of the licence. Where then is the fraud? It is contended that the licence was exhauſted by taking in this one cargo. Without conſidering this as a queſtion to be governed by the rules of conſtruction applicable to policies of inſurance, and taking it on the terms of the licence only, can it fairly be ſtated that the licence was exhauſted by this firſt cargo? The veſſel was driven back by the ſeverity of the elements to the port from which ſhe ſailed, and there detained; during which detention another cargo was ſubſtituted in lieu of the original cargo; but is there more than one cargo imported into this kingdom? Then as to there being any unneceſſary delay. The licence, by having fixed a terminus, a quo and ad quem in reſpect of time, certainly contemplated as ſpeedy a proſecution of the voyage as the nature of it would admit. It may be a fit queſtion, therefore, for a jury, whether due ſpeed has been uſed; for although the licence is not ſo peremptory, in reſpect of the period fixed by it, as to require a ſtrict and literal compliance, yet it muſt be conformed to as nearly as poſſible. The queſtion then upon a new trial will be, whether this was a bonâ fide proſecution of the voyage according to the fair import of the licence, which has not been ſubmitted to a jury, the cauſe not having arrived at that ſtage of enquiry. The ſecond queſtion is, whether there has been any fraud on the terms of the policy. The policy was ſpecifically on wheat, not on pitch or tar, nor a general policy, and the ſecond cargo is a wheat cargo,

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cargo, and quoad this policy the only one; for the Court cannot turn its eye back and look at the cargo of pitch and tar to which the policy does not apply. The voyage with reſpect to the wheat cargo was proſecuted duly and bonâ fide. If, therefore, the voyage was fairly within the terms of the licence, the duplicity of the cargo, (if I may be allowed the expreſſion,) that is, the circumſtance of there being a cargo of pitch and tar firſt, and of wheat afterwards, will not invalidate the policy. The impreſſion upon my mind at the trial muſt have been that the firſt cargo occupied the policy, and if that had been the caſe, it is quite clear that the policy would not have covered two ſucceſſive riſks. But whether that impreſſion was taken improvidently or on the ſuggeſtion of others, it now appears to be erroneous; and I cannot help thinking that I could not have ſeen the policy; or I ſhould have held that it was not intended to cover the cargo of pitch and tar. Upon the firſt point it is certainly a very fit queſtion for a jury whether the licence was abuſed by being treated as a floating protection to cover different cargoes, or whether it was not promptly and fairly executed, and the ſecond cargo bonâ fide ſubſtituted without any unneceſſary prolongation of the voyage: if it was, it will be protected by the licence. The ſecond queſtion will be whether there was any fraud upon the underwriters, this being an inſurance upon a ſpecific cargo of wheat, from the circumſtance relating to the cargo of pitch and tar. I lay out of the caſe all queſtion upon the ſecond licence; becauſe the party is entitled to ſtand on the terms of the firſt licence, and a miſconception in procuring another licence ſhall not operate to his prejudice. Under theſe circumſtances I think

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I think it fit that the rule for a new trial ſhould be made abſolute, but without coſts, as there is no fault in either party.

Per Curiam, Rule abſolute.

Tueſday, Jan. 26th.

HESELTON *againſt* ALLNUTT.

Where goods were inſured from *Heligoland* to *Memel*, with liberty to touch at any ports and to ſeek, join, and exchange convoy, warranted free from capture in the port of *Memel*, and the ſhip ſailed from *Heligoland* with orders to go to *Gottenburgh* to know whether to proceed to *Anholt* or *Memel*, and was captured in her way to *Gottenburgh*, which is in the track either to *Anholt* or *Memel*: Held, that this was to be conſidered as a voyage to *Memel*, although it was ſubject to be changed according to circumſtances upon the ſhip's arrival at *Gottenburgh*; and therefore the riſk commenced on her leaving *Heligoland*; and the ſhip never having reached *Gottenburgh* the purpoſe of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a reſtraint on the captain's judgment as to the place of ſeeking convoy, it not appearing that he could have met with convoy before the capture; and conſequently the underwriter was liable.

THIS was an action on a policy of aſſurance on goods by the ſhip *Vrow Gesina*, at and from *Heligoland* to *Memel*, with liberty to touch at any ports or places whatſoever and whereſoever, and to ſeek, join, or exchange convoy, warranted free from capture in the port of *Memel*. The loſs alleged was by capture. The caſe was this: on the 19th of *November* 1810 the ſhip ſailed from *Heligoland* with a cargo of ſugar, having a written order aboard which was delivered to the captain by the ſhippers of the goods at *Heligoland*, directing him to go to *Gottenburgh*, and there aſcertain whether he ſhould proceed to *Anholt* or *Memel*, and if he found a convoy at *Gottenburgh* to join it. On the 6th of *December* following the ſhip was driven by a gale of wind under the batteries of *Skegan*, and there taken by the *Danes*. *Skegan* is about five *German* miles from *Gottenburgh*, and in the track from *Heligoland* to *Gottenburgh*; and *Gottenburgh* is in the way either to *Anholt* or *Memel*.

At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term, the counſel for the defendant objected to the plaintiff's right to recover on

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the loſs, upon the ground that there had not been an inception of the voyage inſured; in ſupport of which objection they relied on the caſes of *Wooldridge* v. *Boydell* (*a*), and *Way* v. *Modigliani* (*b*), and a verdict was found for the plaintiff with liberty to the defendant to move to enter a nonſuit upon this objection; which rule was accordingly obtained in laſt *Michaelmas* term, when another objection was alſo ſtated as ariſing out of the caſe of *Middlewood* v. *Blakes* (*c*), that the captain was reſtrained by the orders from electing to ſeek convoy at any place but *Gottenburgh*, whither he was bound to go at all events.

The Solicitor-General, *Park*, and *Parnther* now ſhewed cauſe, and firſt obſerved upon the liberty contained in the policy to touch at any ports whatſoever, and to ſeek, join, or exchange convoy, under which they contended that the plaintiff had a right to go to *Gottenburgh* either for convoy or for other purpoſes connected with the voyage, ſuch as to aſcertain the ſtate of the port of *Memel*, without being guilty of a deviation; they then contended with reſpect to the orders given to the captain as far as they related to *Anholt*, that at the utmoſt thoſe orders could be conſidered only as a deſign on the part of the aſſured to deviate, which deſign had never been executed; and that where the termini of the intended voyage are the ſame as thoſe deſcribed in the policy, which was the caſe here, the voyage is to be conſidered the ſame, and a mere intention to deviate will not avoid the policy. It was ſo held in *Kewley* v. *Ryan* (*d*), where the ſuppoſed deviation was as much

(*a*) *Doug.* 16. (*b*) 2 *T. R.* 30.
(*c*) 7 *T. R.* 162. (*d*) 2 *H. Bl.* 343.

contem-

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contemplated as in this case, and in *Wooldridge* v. *Boydell*, Lord *Mansfield* is reported to have said that a deviation merely intended, but never carried into effect, is as no deviation. In *Way* v. *Modigliani* an actual deviation had taken place, as was observed in *Kewley* v. *Ryan*; and in *Middlewood* v. *Blakes*, *Lawrence* J. said that if the vessel had been captured before she arrived at the dividing point, he should have thought the underwriter would have been liable. Now here, allowing the utmost effect to the orders given to the captain, they amount only to a contemplation to deviate, and the ship was captured before the dividing point; so that this case falls within both the distinctions taken in the former cases. As to the captain's judgment being restrained by the orders with respect to the place of joining convoy, upon a similar objection to which the case of *Middlewood* v. *Blakes* turned, there is no evidence to shew that the captain could have had any opportunity of making an election to join convoy before he reached *Gottenburgh*, and therefore that case does not apply.

Topping and *Marryat* contrà. The application for a nonsuit was made not on the ground of a deviation, but on the ground that there had not been any inception of the voyage insured. To entitle the assured to recover upon a loss, it must be a loss within the voyage insured; and for that purpose it is necessary that the voyage should be declared in the policy. Here it is declared as a voyage to commence at *Heligoland* and end at *Memel*, whereas it appears that the real voyage, so far from being fixed to terminate at *Memel*, was not to be declared until the ship arrived at *Gottenburgh*. Instead, therefore, of being a voyage from *Heligoland*, with a cer-

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tain deſtination to *Memel*, it was to remain in ambiguo until the ſhip's arrival at *Gottenburgh*, whether her ultimate deſtination was to be *Anholt* or *Memel*, and nothing was in certainty except that ſhe was to go to *Gottenburgh*. There is therefore a main diſtinction between this caſe and that of *Kewley* v. *Ryan*, and *Middlewood* v. *Blakes*, where the termini of the intended voyages were fixed as deſcribed in the policy, and therefore what was ſaid by *Lawrence* J. in the latter caſe does not apply to this. But although *Middlewood* v. *Blakes* differs in this reſpect from the preſent caſe, it is nevertheleſs an authority in point, to ſhew that if the captain's judgment was fettered by the orders as to the place of his ſeeking convoy, it is tantamount to a deviation. Now according to the terms of the policy the captain ought to have joined the firſt convoy he met; but according to the orders it is clear that he was bound to *Gottenburgh* at all events, and had not an option to ſeek for convoy elſewhere, nor to join an earlier convoy if he had fallen in with one, and hence the riſk of the underwriters was materially increaſed.

Lord ELLENBOROUGH C. J. This is a caſe which is ſomewhat new in its circumſtances, and at the time when it was moved I wiſhed to have it brought under the conſideration of the Court. Having now heard the arguments and what is material to be adduced on the point, I think there was an inception of the voyage inſured. The way in which it ſtrikes my mind is this, viz. that the preponderating intent of the aſſured was to go to *Memel*; although that intent was liable to be changed according to circumſtances. But I am not aware that it is laid down in any book, if the terminus be once fixed, that becauſe it is made ſubject to alteration dependant

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upon circumstances, it shall on that account be less a voyage to that place, to which the party originally contemplated to go. I think that there may be a good inception of the voyage under a fluctuating purpose. Here, as I have said, the preponderating purpose was to go to *Memel*; which appears by the warranty "free from capture in the port of *Memel*." As to the other question, whether under a liberty to seek, join, and exchange convoy the policy may not be affected by fettering the discretion of the captain, we are not called upon to decide that point; because it does not appear that the captain had an opportunity of exercising any discretion as to joining convoy before the capture; and as he never reached *Gottenburgh*, the utmost that can be made of the orders will only be this, that they amount to a contemplated deviation. It may be observed, however, that this liberty is not introduced into the policy by way of stipulation on the part of the assured that they will seek and join convoy, but is granted to them for their benefit, and for the purpose of obviating any doubt as to its being a deviation, in case they should go out of their way in seeking convoy; but I am not aware that the restraining this liberty would vary the rights of the parties. Considering then the case on the question of non-inception, I think that there was a good inception of the voyage from *Heligoland* to *Memel*, subject to be changed according as circumstances might require; and I do not know that such a contingent purpose will defeat a bonâ fide inception. On the other point, if the vessel had gone to *Gottenburgh* and been delayed there by waiting for orders; that would have been a deviation; but as the case is now presented to us, it is merely an unexecuted intention to deviate, which will not vitiate the policy.

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GROSE J. I think there was an inception of the voyage, for although the intent was as ſtated, ſtill it muſt be conſidered ſubſtantially as a voyage to *Memel*.

LE BLANC J. It is admitted that *Gottenburgh* was in the way to *Memel*, and alſo that the veſſel was captured in the courſe of her voyage to *Memel*, and before ſhe reached *Gottenburgh*; and it does not appear that ſhe had any opportunity of getting convoy from the time of her ſailing from *Heligoland* until her capture; ſo that the captain did not act under any reſtriction. All queſtion therefore of deviation is out of the caſe, which brings it to the queſtion, whether the veſſel ſailed on the voyage inſured. It is clear that although the policy ought to contain an accurate deſcription of the voyage, yet it need not compriſe every intermediate port at which the ſhip may be intended to touch, according to *Kewley* v. *Ryan* and *Middlewood* v. *Blakes*. Here *Gottenburgh* was an intermediate port at which the captain was to touch for orders, whether he was to go ultimately to *Anholt* or *Memel*; but the primary intention was to go to *Memel*. If indeed he had gone into *Gottenburgh* merely for orders, it would have been a deviation, as it would have been if he had gone to *Anholt*; but he was captured before he arrived at either of thoſe places. It ſeems to me that this caſe in many points reſembles that of *Middlewood* v. *Blakes*, (with the exception indeed of the ultimate deſtination not being finally ſettled, upon which I have already obſerved,) and it was ſaid in that caſe by *Lawrence* J. that if the loſs had happened before the ſhip came to the dividing point, he ſhould have thought the plaintiff entitled to recover. Here the loſs did ſo happen, and the underwriters ran no additional riſk by the captain's intention to deviate afterwards. I

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am therefore of opinion that this verdict ought to ſtand.

BAYLEY J. *Memel* was certainly one of the places which was primarily fixed upon; and it was not clear when the capture took place that it would not have been the ultimate place of deſtination. It has been contended however that the judgment of the captain was fettered by the orders to go to *Gottenburgh*; but he never acted upon thoſe orders, and it by no means follows that if he had gone thither he would have ſtaid at *Gottenburgh* longer than for the purpoſe of getting convoy. It is ſuggeſted however that there might be other places at which he might have previouſly joined convoy; but if it had been proved that an earlier convoy might have been procured at another place, and that notwithſtanding, the captain had omitted to join it in order that he might ſail to *Gottenburgh*, that might perhaps have been a caſe of deviation.

Rule diſcharged.

Wednesday, January 27th.

GLASER and Another *againſt* COWIE and Another.

A broker who has neglected to inſure the premium according to the directions of his principal, cannot ſet up as a defence that he was directed alſo to inſure againſt *Britiſh* capture; for that is not a crime ſo as to render the whole inſurance illegal, though it would be void pro tanto.

ACTION againſt the defendants as agents of the plaintiffs, for not effecting an inſurance according to orders, viz. to inſure the premium. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt term, it appeared that the defendants, who were merchants in *London*, received from the plaintiffs, who reſided and carried on buſineſs at *Stralſund*, a letter dated the 20th of *April* 1810, and written by their managing clerk, which gave orders to the defendants to effect an

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insurance according to the terms of a memorandum inclosed in the letter. The memorandum contained directions for an insurance on goods to the amount of 7000*l.*, and particularly described the adventure to be insured, and that it was to include loss by *British* as well as foreign capture, and at the conclusion (in a postscript written in *German*) it contained these words, "Observe the *premium* on this value is also to be insured." At the time of the receipt of this letter and its inclosure, the defendants also received another letter from the plaintiffs, inclosing a duplicate of the above memorandum, dated the 23d of *April*, and written by the same person as the former, in which he wrote thus: "I confirm all what I "said belonging to the insurance, and send you to-day the "note in *English* to avoid all misunderstanding. I added "*British* capture, though I know it is not lawful, but hope "you will take care for an insurer with whom a policy "of honour may be trusted as good and lawful." The defendants upon the receipt of these letters effected an insurance in general terms against loss or capture by any power whatsoever, on the sum of 7000l., but not upon the premium. It was objected by the defendants, that the order for the insurance was illegal, inasmuch as it contained a direction to include loss by *British* capture, and therefore could not be made a ground of action against the defendants for not complying with it. But Lord *Ellenborough* C. J. held that the order was obligatory upon the defendants to insure the premium; for although they might have renounced the order altogether if they had so pleased, yet if they adopted it, they were bound to execute it, as far as by law they might, secundum formam jubentis. Whereupon the jury found a verdict for the plaintiffs.

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Topping now moved for a new trial upon the ground that the neglect of the defendants to comply with the order in one part of it, ought not to place the plaintiffs in a better ſituation than they would have been in, if the defendants had ſtrictly performed the order in every part. He contended that if they had ſo done, the plaintiffs could never have recovered upon the policy, becauſe the inſurance againſt *Britiſh* capture, which the order directed, would have made the policy void: they ought not therefore to derive from a partial omiſſion of the defendants a benefit which they would not have had, if their order had been completely executed.

Lord ELLENBOROUGH C. J. This omiſſion was certainly a ſlip of the defendants, which probably aroſe from the direction reſpecting the inſurance of the premium being in a foreign language, and occurring in a few words at the end of a letter of conſiderable length. But ſtill as the firſt letter contained a ſpecific direction, which was confirmed by the ſubſequent letter, the defendants were bound to attend it. It is true that the plaintiffs ſay in their ſecond letter, that they added *Britiſh* capture, though they knew it was not lawful; but it is not a crime to inſure againſt *Britiſh* capture, ſo as to make the whole policy illegal and void, as this Court ſeem to have thought in the caſe of *Lubbock* v. *Potts* (*a*); though perhaps ſuch inſurance would have been void pro tanto. In this reſpect the defendants conducted themſelves with adroitneſs by effecting an inſurance in general terms, which would be conſtrued to extend to ſuch captures only as they might lawfully inſure againſt.

(*a*) 7 *Eaſt*, 449.

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The other Judges concurred; and *Le Blanc* J. added, that poſſibly the defendants might have met with ſuch an inſurer as the letter of the plaintiffs alluded to, with whom a policy of honour might have been entruſted.

Rule refuſed.

THOMPSON and Another, Executors, &c. *againſt* COTTER, KELLETT, and two Others.

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If plaintiffs ſue out joint and bailable proceſs againſt four defendants, they cannot declare againſt one ſeparately, though the others are out of the juriſdiction of the Court.

PLAINTIFFS having ſued out an alias bill of *Middleſex* againſt the four defendants, upon one affidavit of debt, ſtating them to be indebted to plaintiffs as executors, on which *Kellett* alone was arreſted and holden to bail, afterwards declared againſt *Kellett* ſeparately. Whereupon a rule niſi having been obtained for ſetting aſide the declaration and proceedings for irregularity, and for entering an exoneretur on the bail-piece;

Lawes ſhewed cauſe, and contended that as where proceſs is not bailable it had been held that ſeveral defendants may be joined in one writ, and the plaintiff may afterwards declare againſt them ſeparately (*a*); ſo the ſame thing might be done here, for except as to the right of holding the defendants to bail, there was not any ſolid diſtinction between proceſs bailable and not bailable. Beſides, here, there was an additional reaſon why the plaintiffs ſhould be permitted to declare ſeverally, becauſe the other three defendants were in *Ireland*, and could not be ſerved with proceſs.

(*a*) *Stables* v. *Aſhley*, 1 *Boſ. & Pul.* 49.

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Topping and *Littledale* in ſupport of the rule, relied on *Lewin* v. *Smith* (*a*).

Per Curiam. The ac etiam ſhews that the party has elected that the proceſs ſhall be conſidered as joint proceſs, and not as joint and ſeveral; and it is not competent to a plaintiff to declare ſeparately againſt one of four defendants upon joint and bailable proceſs. But an exoneretur ought not to be entered on the bail-piece, as the plaintiffs may declare de novo. Let, therefore, ſo much of the rule only, as requires the declaration to be ſet aſide for irregularity, be made

Abſolute (*b*).

(*a*) 4 *Eaſt*, 589. (*b*) See *Chapman* v. *Eland*, 2 *New Rep.* 82.

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PALMER and WILKINS *againſt* BAKER.

An indenture aſſigning to the plaintiffs a contract for the purchaſe of timber, upon certain truſts for ſecuring to themſelves out of the proceeds the re-payment of the purchaſe-money advanced by them, and alſo of a certain balance before due to them, together with intereſt thereon at 5 per cent. up to the time of payment, and alſo the further ſum of 200*l.* as and for a reaſonable profit and compenſation for the trouble they would be at in the buſineſs, and alſo all coſts, charges, damages, and expences which they might be put to on account of the premiſes, is not uſurious upon the face of it; for the 200*l.* allowed for trouble is not neceſſarily to be intended as a colorable reſervation of further intereſt beyond the legal intereſt, but as a compenſation for trouble not comprehended within the words coſts, charges, damages, and expences; neither is it ſo exceſſive as to be intended uſurious on that account.

THE plaintiffs, who were bankers at *Bourton* in *Glouceſterſhire*, and had been put into poſſeſſion of certain timber, part felled and part growing, of *John Huband*, at *Eveſham* in *Worceſterſhire*, brought trover againſt the defendant, ſheriff of *Worceſterſhire*, to recover the value of part of the timber taken by him in execution at the ſuit of a creditor of *Huband*. The cauſe was tried before *Le Blanc* J. at the laſt aſſizes at *Worceſter*, when the plaintiffs recovered a verdict for 362*l.* 10*s.*, which diſpoſed of all the queſtions of fact, reſerv-

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ing only a queſtion of law upon the conſtruction of the indenture after mentioned, whether it was or was not uſurious upon the face of it; as to which the learned Judge had directed the jury in favour of the plaintiffs.

The indenture, dated the 15th of *May* 1811, was made between *J. Huband* of *Eveſham* in the county of *Worceſter*, timber merchant, and the plaintiffs, *Palmer* and *Wilkins*, of *Bourton-on the-Water* in *Glouceſterſhire*, bankers. It recited, that by an agreement in writing of the ſame date, between the Hon. *J. Lindſay* and the ſaid *Huband*, *Lindſay* agreed to ſell, and *Huband* to purchaſe all the timber growing on the *Lench* eſtate, the property of *Lindſay*, for 4800*l.*, to be cut in ſuch proportions and manner as therein mentioned, with certain exceptions ſpecified. *Huband* agreed to fell and carry away all the timber before the 29th of *September* 1813, until which time he was to have the uſe and occupation of the wood-land, and was then to deliver it up to *Lindſay* in a proper ſtate for cultivation, under the penalty of 7*l.* an acre. And *Huband* alſo agreed to give up to *Lindſay* any of the timber at a valuation to be made by two indifferent perſons, and to pay *Lindſay* for the purchaſe of the timber and the occupation of the land 4800*l.*, viz. 600*l.* on the execution of the agreement, a banker's acceptance for 1600*l.* payable at 75 days after date, and another like acceptance for 300*l.* payable on the ſame day, two other ſuch acceptances for 1000*l.* each, payable 10 months after date; and another ſuch for 300*l.* payable on the ſame day. That *Huband* ſhould be allowed proper roads for conveying the timber off the lands. In caſe it ſhould appear that the timber was not a valuable bargain to *Huband*, *Lindſay* was to make him a reaſonable allowance for the timber reſerved ſtanding, &c. The indenture recited further that *Huband* being indebted to the plaintiffs *Palmer* and *Wilkins*

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Wilkins in 1424*l.* upon the balance of his account, it was agreed between them that he ſhould aſſign the above-recited agreement and all his intereſt under it to *Palmer* and *Wilkins* in manner and for the purpoſes thereinafter mentioned, they undertaking to fulfil the ſaid agreement with *Lindſay* on the part of *Huband*, with reſpect to making the ſeveral payments at the times and in the manner therein mentioned. The indenture then witneſſed that *Huband* for the conſiderations mentioned ſold, aſſigned, and ſet over to *Palmer* and *Wilkins* all the timber and other the premiſes mentioned in the recited agreement and agreed to be purchaſed by *Huband* of *Lindſay*, together with the agreement itſelf, and all *Huband*'s intereſt therein, upon the truſts and ſubject to the proviſo aftermentioned, i. e. upon truſt, in the firſt place, out of the proceeds which may from time to time ariſe from the ſale of the premiſes to retain and repay themſelves firſt the 4800*l.*, the amount of their acceptances for the purchaſe-money as aforeſaid; then the ſaid 1424*l.* owing to them from *Huband* upon his account ſtated, together with intereſt thereof at 5*l.* per cent. up to the time of payment; *and alſo the further ſum of* 200*l.* *as and for a reaſonable profit and compenſation for the trouble they will be at in the preſent buſineſs*; and *alſo all coſts, charges, damages, and expences* which they ſhall or may expend, be put to, or be liable for, on account of the premiſes or in anywiſe relating thereto. And for the more eaſily carrying into effect the ſaid truſts *Huband* appointed them his attornies, for and in his name to fell, carry away, and diſpoſe of the timber and bark, and receive and ſue for the money due thereon, and to perform all other lawful and reaſonable acts in and about the premiſes. Then followed covenants by *Huband* that he had lawful authority to

assign the premises to *Palmer* and *Wilkins*, free of all incumbrances, and to let them take possession, &c.; and a proviso that in case the money to arise by the sale of the timber and premises should not be sufficient to repay *Palmer* and *Wilkins* the said several sums of 4800*l.*, 1424*l.*, and interest thereon, and 200*l.*, and all the said costs, charges, and expences, then *Huband* should pay them what should then appear to be due to them. But if the money to arise from such sale should be more than sufficient to pay the said sums, then they should repay and re-assign to *Huband* the surplus.

It appeared in evidence at the trial that *Huband* was indebted to the plaintiffs as bankers in 1424*l.*, and also in 600*l.* for an advance by the plaintiffs to make good *Huband*'s deposit to *Lindsay*, with whom he had contracted for the timber; and previously to entering into the deed *Huband* applied to the plaintiffs, telling them he had made a beneficial bargain, if it could be realized, but he could not realize it, and he proposed to the plaintiffs to assign his interest to them by way of mortgage. The plaintiffs refused that, but offered to take an absolute assignment of the property, and to stand in *Huband*'s place. *Huband* declined this offer, but further proposed that, if the plaintiffs would take upon themselves the working of the timber, and also the making the payments, he should make them an allowance of 200*l.* for their trouble; which was agreed to. At that time a very small part of the timber was cut, the rest was standing. In a week afterwards *Huband* went on the ground, and told the workmen that the timber was the plaintiffs' property, and that they were to be their paymasters.

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masters. The bankers lived 24 miles from the place where the timber grew.

Puller obtained a rule nisi in last *Michaelmas* term for entering a nonsuit, upon the ground that after the deed between *Huband* and the plaintiffs had already provided for the re-payment of all the money due and advanced, with interest thereon, and also of all costs, charges, damages, and expences which the plaintiffs might incur on that account, a covenant for the further payment to them of 200*l.* by way of compensation for trouble was usurious upon the face of it, and the deed therefore void.

Dauncey, *Jervis*, and *Abbott* now shewed cause, and after suggesting that the stipulation respecting the payment of interest might perhaps be deemed to extend only to the sum of 1424*l.*, which was the last antecedent, and not to the sum of 4800*l.*; in which case, the interest upon the latter sum would far exceed the additional 200*l.* agreed to be paid, as a compensation; contended that without the aid of such a construction the covenant for the further payment of the 200*l.* was not usurious. The Court will not infer usury unless it be a necessary inference, neither will they raise that inference by weighing very nicely the quantum of compensation, if it can be shewn that there was any substantive trouble in respect of which a compensation might be agreed upon. Now here considerable personal trouble was cast upon the plaintiffs in carrying the stipulations of the deed into effect, which would not come under the head of costs, charges, damages, or expences to be recouped out of the sale price; such as the trouble attending the hiring and payment

ment of the workmen, keeping an account of wages paid, and the loſs of time in ſuperintending the felling the timber; and theſe are enough to ſhew that the covenant for the payment of the 200*l.* is not without conſideration.

Puller contrâ. The covenant for payment of intereſt extends as well to the 4800*l.* to be advanced as to the 1424*l.* due. Then there is no expence or trouble caſt upon the plaintiffs for which the deed has not expreſsly provided that they ſhall be reimburſed, and conſequently the covenant for the payment of 200*l.* by way of compenſation for their trouble, is only a color to cover a further rate of intereſt, and the deed is uſurious upon the face of it. It is ſaid that the payment of the labourers and keeping the account of ſuch payments is an additional trouble not provided for by the deed: to which it may be anſwered, that this is a trouble for which the plaintiffs are not entitled to any remuneration; for they are bankers, and it is a part of their ordinary buſineſs as ſuch to make payments and keep accounts of them. As to the felling the timber, if it was neceſſary to employ an agent for that purpoſe, and as to their own trouble and expence of ſuperintending that agent, if any ſuch were incurred, the deed allows them to retain to that amount. [*Le Blanc* J. The covenant by liquidating the amount of the compenſation in reſpect of trouble at 200*l.* precludes them from claiming to make a deduction beyond that amount. Lord *Ellenborough* C. J. Suppoſe the covenant inſtead of ſtipulating for a compenſation to the amount of 200*l.* had been in blank, could the Court upon looking at this deed pronounce that the execution of the truſts would not be attended with any ſuch portion of trouble as might be a fair

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GROSE J. Before we give effect to this objection, which is to invalidate the deed, we must see clearly that this is a case of usury; that the 200*l.* was meant as a further compensation beyond the legal interest for the advance of the loan. At first I had some difficulty in conceiving that so large a sum as 200*l.* could be allowed merely as a compensation for trouble; but upon looking further into the deed I perceive that the carrying its trusts into effect would probably last between two and three years. During that time the plaintiffs might have a great deal of trouble in procuring fit workmen and proper markets to dispose of the timber, and therefore it seems fair that a provision should be made for paying them so much as their trouble might require. Such a provision then in itself is not colorable, and under the circumstances I cannot say that 200*l.* was more than their trouble might require in getting back their principal and interest.

LE BLANC J. In order to defeat the plaintiff's title under this deed the Court must see clearly that it is usurious on the face of it. It must be remembered that we are called upon to decide on the deed as it now stands, without waiting for the comment on it which might have been made after the whole accounts between the parties had been wound up, and the final result had appeared on the bankers' books. The argument now used to shew that the deed is usurious is this, viz. that all the trouble and expence which the plaintiffs may incur in engaging labourers and taking the other necessary measures for the felling and sale of the timber, are provided for under the words "costs, charges, damages, and expences," enumerated in the deed, and therefore the

allowance of 200*l.* for trouble which is already comprehended within thoſe words muſt be neceſſarily colorable. But the words may bear a very different conſtruction when coupled with ſuch a ſpecific allowance for trouble as in the preſent caſe, from that which they might have borne if no ſuch allowance had been made; ſo that now they will not comprehend a general charge for trouble, but the plaintiffs will be limited upon that head to the ſpecific ſum of 200*l.*, whatever their trouble may be, and this allowance therefore may be conſidered as reſtrictive of the conſtruction to be put on thoſe words. As to the conſtruction ſuggeſted that the 200*l.* may be conſidered as allowed in lieu of intereſt upon the money to be advanced, I do not agree to it; for I take the words "together with intereſt thereof up to the time of payment," to relate as well to the 4800*l.* as to the 1424*l.* before mentioned: the plaintiffs therefore are not entitled to the benefit of that argument.

BAYLEY J. If any part of the 200*l.* agreed to be allowed as a compenſation for trouble, was intended as an additional bonus for the advance of the money, it would amount to a reſervation of uſurious intereſt, and the inſtrument would be avoided by it; but if the whole ſum be referable to trouble only, then the tranſaction will be a fair one. And it is difficult to ſay that the whole of the 200*l.* was not for trouble: if the defendant meant to inſiſt that a part of it was not for trouble, that would have been a queſtion for the jury; but there is nothing to lead us to a conclusion that the whole was not for trouble. The very act of aſſigning this timber to the plaintiffs caſt on them a duty and reſponſibility; and it is admitted, that the plaintiffs were not ſkilled in the buſineſs, and muſt

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have employed an agent to ſuperintend it, and conſequently they muſt have gone to the ſpot from time to time to ſee that that agent did his duty; for they would have been liable over to *Huband*, if he had been guilty of any groſs neglect of his duty. In addition to this they had the trouble of paying the workmen their wages, and finding out purchaſers. The jury have not found that the compenſation was colourable, or exceſſive; and upon the face of the deed we cannot ſay that it is.

Rule abſolute.

Wedneſday, Jan. 27th.

SMYTH, Clerk, *againſt* SAMBROOK.

In an action on the ſtat. 2 & 3 *Ed.* 6. *c.* 13., for not ſetting out the tithe of wheat, barley, oats, peas, and vetches; the jury found a cuſtom throughout the pariſh for the parſon to take the 11th ſhock of wheat and the 11th cock of barley, &c., Held, that there was a ſufficient conſideration for the cuſtom as to the wheat, it appearing that the farmer had always been uſed to put the ſheaves into ſhocks, and in caſe of bad weather to open them to dry, and therefore the cuſtom was good: but as to the barley, &c., there was no ſufficient conſideration, it appearing that the farmer only put them into cocks without doing any thing farther, except that in caſe of wet weather, before the parſon tithed them, he opened the cocks of barley and oats, and put them up again, which was in fact for his own benefit: the cuſtom therefore as to the barley, oats, peas, and vetches was held void.

THIS was an action of debt; the firſt and ſecond counts of the declaration were framed upon the ſtat. 2 & 3 *Edw.* 6. *c.* 13.; the firſt ſtated that the plaintiff was rector of *Worthen*, in the counties of *Salop* and *Montgomery*, and proprietor of the tithes of corn, grain, and hay, clover, rye-graſs, and peas and vetches growing on land within that part of the pariſh lying within the county of *Salop*, in the occupation of the defendant, and all ſuch tithes for 40 years before the ſtatute ought to have been ſet out and paid in kind. And then it charged that the defendant had cut down and reaped ſo many acres of corn, grain, and hay, and clover and rye-graſs, and peas and vetches growing upon

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the ſaid land, the tithe whereof belonged to the plaintiff, and ought to have been juſtly divided, ſet out, and paid to him as rector and proprietor; yet, that the defendant, after reaping, cutting down, and gathering the ſaid corn, &c. took and carried away the ſame from the land where the ſame had ſo grown, &c. and ought to have been tithed, *the* 10*th part* of the ſame, or of any part thereof reſpectively, *not having been juſtly ſeparated, divided, or ſet out from the* 9 *parts reſidue thereof*, nor any compoſition made with the plaintiff for the tithe thereof, &c. contrary to the form of the ſtatute. The ſecond count was for the ſubtraction of the ſame tithes; only ſtating the plaintiff generally to be the proprietor of certain tithes in that part of the pariſh lying within the county of *Salop*; and it ſtated the gravamen to be the carrying away by the defendant of the corn, &c. growing upon the ſaid land, the tithe of which belonged to the plaintiff, and of right ought to have been ſet out and paid to him, the 10th, *or other part* of the ſame reſpectively, or of any part thereof not having been duly ſeparated, divided, and ſet out from the reſidue thereof, as the ſame of right ought to have been done. There were other general counts for the value of tithes belonging to the plaintiff, ariſing out of certain lands in the pariſh, &c. in the defendant's occupation.

This cauſe was tried before *Le Blanc* J. at *Shrewſbury*, when the jury, upon the queſtion being left to them on the evidence, found that there exiſted throughout the pariſh an immemorial cuſtom for the rector to take the 11th mow or ſhock of wheat, and the 11th cock of barley, oats, peas, and vetches; on which a verdict was taken for the plaintiff for treble the value of the different titheable matters, with liberty to move the Court

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to enter a nonsuit, or to reduce the damages, in case the Court should be of opinion on the evidence, that such custom was valid in point of law as to all or any of the subjects of tithe; and for that purpose the treble value of the wheat was settled at 45*l.*, the treble value of the barley and oats at 39*l.*, and that of the vetches and peas at 6*l.* The evidence was, that as to the wheat, the farmer had always put the sheaves into shocks or mows, consisting of 6 or 9 sheaves; and in case of bad weather, opened the mows or shocks and the sheaves to dry them, and that the parson's 11th mow or shock was set out at the time the whole was ready to carry and not before. As to the barley and oats, it was proved that they were put into cocks, and the 11th cock set out for the rector; but nothing farther was proved to be done to the barley or oats, except that some of the witnesses said that if it was wet weather before the parson tithed it, they opened all the cocks and put them up again. As to the vetches and peas, they were first cut into little wads of unequal size, and then put into cocks of equal size, and the parson had the 11th cock; and they gave the parson notice to tithe, as soon as they were put into cocks. A rule nisi having been obtained by *Jervis* in the last term, according to the liberty reserved at the trial;

Dauncey, *Abbott*, and *Eyton* now shewed cause. As to the wheat, the usual and common law mode of tithing that article is in the sheaf (*a*). It may be admitted, however, that a custom for setting out the tithe of wheat in the shock, and not in the sheaf, has been holden to be

(*a*) See the authorities cited in *Halliwell* v. *Trappes*, 2 *Taunt.* 58.

valid (*a*), but the cases in which that mode of tithing has been sustained go no farther; they decide nothing as to the quantum to be rendered; for it was not denied in any of them that the 10th shock was due; and it is singular that even that custom was resisted upon the ground of there not being a sufficient consideration for it, which consideration it is now contended is sufficient to bind the parson to take the 11th shock. The question, therefore, now before the Court goes farther than any of those cases, and is this, Whether upon the evidence as reported by the learned Judge, a custom for setting out the tithe of wheat in the 11th instead of the 10th shock is a valid custom. It is clear that in order to support such a custom, there ought to be an adequate consideration, *i. e.* a degree of labour, beyond what the common law requires, bestowed by the farmer upon the subject-matter of the tithe, and that too not for his own benefit, but for the benefit of the parson. But the labour which the farmer has bestowed in this case by putting the sheaves into shocks, has been done for his own benefit alone; for it is for the farmer's convenience that the wheat should be shocked as soon as possible without incurring the delay which would necessarily be occasioned by the parson's tithing it in the sheaf: the parson on the one hand cannot compel him to extend his labour beyond the sheaf, neither can the farmer on the other hand compel the parson to take an 11th instead of a 10th, which is his due, because he chooses to extend his labour to the shock. The only case which seems to sanction such a custom as the present is an anonymous one in *Latch* (*b*); but its authority appears to have been over-ruled by a

(*a*) *Pern* v. *Fountain*, 1 *Wood's Dec.* 504., cited in 4 *Gwm.* 1509.
(*b*) *P.* 226.

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ſubſequent deciſion in *Trewin* v. *Bond* (*a*). In that caſe a cuſtom to ſet out the tithe of corn in ſtichs of 12 ſheaves, or ſtitches of 10 ſheaves, and to pay no tithe for the odd number of ſheaves under 10, was holden to be void. If then the additional labour performed by the farmer in putting the ſheaves into ſtitches, was not conſidered in that caſe as ſufficient to warrant the deduction of ſo minute a portion as the tithe of the odd ſheaves, the ſame degree of labour will hardly be deemed ſufficient to ſanction the withholding of ſo large a proportion as would be effected by the payment of an 11th inſtead of a 10th ſhock. In ſupport of a cuſtom apparently ſo beneficial to the farmer, it ought at leaſt to be ſhewn that there exiſts ſome proportion between the value of the additional labour beſtowed and that of the tithe withdrawn, whereas upon a compariſon of the two, the reſult may be proved to be in favour of the farmer in the proportion of 16 to 1. As to the oats, barley, peas, and vetches, they contended that it appeared the cock was the firſt ſtate in which they became of equal ſize ſo as to be capable of compariſon, and conſequently the firſt ſtage in which they could be tithed; and they referred to *Woodſhaw* v. *Hill*, *C. B. Trin.* 2 & 3 *Geo.* 2. cited by *Parker* C. B. in *Erſkine* v. *Ruffles* (*b*). With reſpect to theſe alſo it was not proved that the farmer had done any thing more than the common law required in order to put them into a tithable ſtate; and conſequently no foundation was laid for the cuſtom as to either of them.

Jervis, *Peake*, and *Puller*, contrà. The principle of tithing is laid down by the Judges in *Knight* v. *Halſey* (*c*)

(*a*) 2 *Gwm.* 565. (*b*) 3 *Gwm.* 967, 8.
(*c*) *D. P.* 2 *Boſ. & Pul.* 196. 4 *Gwm.* 1554. S. C.

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as follows: "The right of the parſon to his tithes in kind accrues on the act of ſeverance: his right to *take* the tithe accrues when the tithable matter after ſeverance is in the earlieſt ſtage of the courſe of huſbandry applicable to it, in which the tenth part may be eaſily diſtinguiſhed from the other nine." The ſame doctrine is held by the Chief Baron in *Collyer* v. *Howes*, in theſe words, (*a*). "The general and irrefragable law of tithing is that each article is to be tithed when it comes into ſuch a ſtate of ſeverance that the parſon may ſee whether he has his fair tenth. The ſtage of the proceſs in which that object is beſt attained marks the time of tithing." It is upon this principle that the common law mode of tithing wheat is in the ſheaf, the ſame being the firſt convenient ſtate in which the tithe can be collected after the corn is cut, affording the parſon an opportunity of comparing his tenth with the other nine parts (*b*). But although this be the general rule, ſtill where according to the uſage the farmer beſtows more labour on the ſubject-matter of the tithe than is required by the common law, that may be a good conſideration to uphold a cuſtom for his rendering leſs than the whole. Accordingly Lord *Kenyon*, in *Knight* v. *Halſey* (*c*), after recognizing the common law mode of tithing corn, expreſsly lays it down, that if the farmer adds his own labour, and takes care of it until it is made into ſhocks, he may by cuſtom be excuſed by paying only an eleventh or twelfth part of the corn: in ſuch caſes the labour of the farmer added to the quantum of the tithe

(*a*) 3 *Anſtr.* 954. 4 *Gwm.* 1490. S. C. See alſo *Halliwell* v. *Trappes*, 2 *Taunt.* 58, 9., and *Shallcroſs* v. *Fowle*, 13 *Eaſt*, 267.

(*b*) See the authorities brought together by *Lawrence* J. in *Halliwell* v. *Trappes*, 2 *Taunt.* 58., and *Shallcroſs* v. *Fowle*, 13 *Eaſt*, 267.

(*c*) *B. R.* 7 *T. R.* 93.

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is considered to be an equivalent for the full tithe. With respect to the wheat therefore, this case falls precisely within the foregoing principles, and the case in *Latch* also instead of standing alone is supported by them as well as by the cases of *Johnson* v. *Aubrey* (*a*), and *Durrant* v. *Booty* (*b*). *Trewin* v. *Bond*, which is said to have overruled it, is very distinguishable; for there the claim was to be exempted from payment of tithe, not in respect of the odd sheaves (as stated) but of the odd stitches, which was clearly a subtraction of the parson's due. As to the barley and oats, it is not contended that they are tithable before they are put into cocks; *Woodshaw* v. *Hill* and other cases have decided that to be their tithable state; but the question here is, has not the farmer done more than the common law required him to do? His duty was simply to put them into cocks, but it appears that he also opened them whenever the rain came; and further, that notice to the parson to take away the tithe was not given until they were in a state ready to be carried. The process of husbandry was therefore completed upon them, and they were brought into the same state with the remainder, which the farmer was about to carry himself. [Lord *Ellenborough* C. J. The wheat being tithable originally in the sheaf, the extra labour employed in putting them into shocks may be a compensation for the substitution of an eleventh instead of a tenth; but as to the other matters is there any other labour than the common law requires except ventilation, which is too uncertain and minute to warrant a departure from the common-law right?] The quantum of labour is immaterial.

(*a*) Cited in a note to *Andrews* v. *Lane*, 2 *Gwm.* 473., *Moor*, 910. *Cro. Eliz.* 660., S. C.

(*b*) 2 *Lutw.* 1071., 2 *Gwm.* 578., S. C.

material. As to the peas and vetches, it is not ſo clear that the cock is the ſtate in which they are tithable; there is no deciſion to that effect: and in *Mantell* v. *Paine* (*a*) it was ſaid by the Chief Baron that with reſpect to peas there is no definite mode of tithing that article to be found in the books. If then they might have been tithed in the wad, the reducing them into cock is an extra labour; and even admitting that they could not have been ſo tithed, ſtill the farmer beſtowed ſome labour upon them by huſbanding them, in the ſame manner as the oats and barley, until they were fit to carry. There is therefore a conſideration to ſupport the cuſtom, as well in reſpect of the peas and vetches as of the other articles.

Lord ELLENBOROUGH C. J. I confeſs I think in this caſe that the cuſtom is good as to the wheat, but not as to the other articles. It appears that the wheat, which at common law is tithable in the ſheaf, is uniformly advanced to a further ſtage of labour by being put into ſhocks, by which it is better protected from the weather: and beſides that, if neceſſity demand it; it is opened for the purpoſes of ventilation. This benefit, together with the additional labour by the farmer for the benefit of the rector, which the rector muſt otherwiſe take upon himſelf, conſtitutes a good conſideration for rendering the 11th inſtead of the 10th ſhock. I ſubſcribe to the doctrine laid down by Lord *Kenyon* in *Knight* v. *Halſey*; that the labour of the farmer added to the quantum of the tithe taken, is conſidered to be an equivalent for the full tithe. But as to the other articles, there is no evidence of any meritorious labour beſtowed

(*a*) 4 *Gwm.* 1511.

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upon them, ſufficient to ſupport any cuſtom. All that is done to the barley and oats is the putting them into cocks; and the mere additional labour of caſually opening them in the event of wet weather, does not ſeem to me in any degree ſuch a conſideration as in the language of Lord *Kenyon* amounts to an equivalent for the deduction claimed. It is too minute; it ought to be a reaſonable benefit to the parſon. As to the peas and vetches, it does not appear that any thing is done to them beyond what the common law requires. It is clear that they cannot be tithed in the wad; for the wad was proved to be of unequal ſize, and therefore they are not then in a ſtate in which a juſt compariſon can be made. It is then the duty of the farmer to put them into ſuch a ſtate, which can only be effected by advancing them to an ulterior ſtage of preparation, *i. e.* by putting them into cocks; which is the firſt ſtage in which they are tithable. I think therefore that the verdict ſhould ſtand, except as to the ſum of 45*l.*, the treble value of the wheat.

GROSE J. As to the wheat, the cuſtom ſeems to me to be good; but as to the barley and oats, there is no adequate conſideration. And as to the peas and vetches, it would be doing miſchief to them to open them again. They would be more likely to be injured by ſhaking.

LE BLANC J. There is a manifeſt difference between the wheat and the other articles. In the caſe of the wheat, there is an ulterior process, to which it is carried after being tithable. It is put into a more convenient ſtage to be carried, which is at all times an additional ſpecies of labour impoſed upon the farmer; and then again in caſe of bad weather, the ſhocks are opened and venti-

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ventilated, which is a further benefit to the rector: that appears to me an adequate consideration for the custom. With respect to the rest; the parson's share is not distinguishable nor the whole tithable until put into cocks: and the farmer cannot bring in aid any occasional ulterior labour which may accidentally be done to the cocks on a wet day by opening them, which the farmer would do for his own benefit, in order to found a consideration for the custom. Until the cocks were actually set out, the farmer could not tell which were the parson's and which were his own; but after the tithe was set out, it does not appear that he ever opened the parson's cocks.

BAYLEY J. I agree with the rest of the Court. The wheat being advanced one stage in the course of husbandry, is a consideration for the custom; and that superadded to the probable expence and trouble attending the re-opening of the shocks in case of bad weather, bears some proportion to the deduction claimed, in giving the 11th instead of the 10th part. But as to the other corn, it will be entirely matter of accident, whether any thing beyond what is required by the common law will be done; and the mere probability of extra trouble is not a sufficient consideration to warrant the custom. With respect to the peas and vetches, the putting them into wads is little more than merely severing them from the root; and there is no evidence of their being opened again after bad weather.

Rule absolute for reducing the verdict 45*l.*

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Wedneſday, Jan. 27th.

Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor purſuant to charter: Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the ſacrament within one year, were not thrown away ſo as to authorize the returning officer to return another candidate who was in a minority.

UPON a rule for an information in nature of a quo warranto againſt the defendant for exerciſing the office of mayor of the borough of *Colcheſter*, it appeared that by the charter granted to that borough in the third year of his preſent majeſty, it is directed that yearly on the *Monday* next after the feaſt of the decollation of *St. John the Baptiſt*, the free burgeſſes of the borough or the major part of them ſhall *nominate* two of the aldermen of the borough; and the mayor of the borough and the reſidue of the aldermen or the major part of them, after ſuch nomination, ſhall *elect* one of the ſame aldermen ſo nominated to be mayor.

On the 31ſt of *Auguſt* 1812, (the day appointed by the charter,) a meeting of the free burgeſſes was held, at which two perſons of the names of *Smith* and *Sparling* together with the defendant, being all three aldermen of the borough, were put in nomination by the free burgeſſes. The mayor having called for a ſhew of hands, declared the majority to be in favour of *Smith* and *Sparling*, whereupon a poll was demanded on the behalf of the defendant, and proceeded in. During the progreſs of the poll, and when the total number of free burgeſſes who had voted were as follows, viz. for *Smith* 99, for *Sparling* 91, and for the defendant 11, the defendant enquired of *Sparling* if he had taken the ſacrament within a year; to which *Sparling* anſwered that he had not; whereupon the defendant gave notice to the free burgeſſes that *Sparling* was ineligible. A freſh nomination did not take place, but the remainder of the free burgeſſes were allowed to poll, at the cloſe of which the total numbers

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were for *Smith* 133, for *Sparling* 123, and for the defendant 22: but the mayor, conſidering *Sparling* as ineligible on the ground above ſtated, returned *Smith* and the defendant to the reſidue of the aldermen, who afterwards elected the defendant to the office of mayor.

Marryat was to have ſhewn cauſe againſt the rule; but declined arguing the point, finding that the Court were againſt him: the Court being clearly of opinion that as notice of the ineligibility of *Sparling* had not been given until after 91 perſons had voted for him, the mayor was not at liberty to treat thoſe votes as thrown away; and to return the defendant, who was in a minority. Whereupon the rule was made abſolute (*a*).

Scarlett was to have ſupported the rule.

(*a*) See the opinion of *Le Blanc* J. in *R.* v. *Parry and Another*, 14 *Eaſt*, 563.

BARNES *againſt* MAWSON.

Thurſday, Jan. 28th.

TROVER for coals, tried before *Wood* B. at the laſt aſſizes at *York*. The plaintiff claimed the coals as having been raiſed from under his freehold tenement called *Whichwell Slacks*, in the manor of *Shelf*, to which he derived title through a ſeries of conveyances in fee ſimple from the year 1655; the firſt of which convey-

Upon a queſtion whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to ſhew by parol evidence that there was a known diſtinction within the manor between OLD and *new land*, and that in fact the plaintiff's lands lay within the boundary of the *new* land; and alſo to ſhew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the ſame boundary, that the right to the coals under the plaintiff's lands was in the lord.

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ances dated in that year contained a covenant for quiet enjoyment, with an exception of "the yearly sum of 12*d.* lord's rent; and also the yearly sum of 8*d.* tithe-money due forth of the premises to the lawful owners or receivers thereof, and of services due to the chief lord or lords." The defendant claimed under the *Saville* family, lords of the manor of *Shelf*, who, as he contended, were entitled to all the coals within a certain district of the manor called the *new land*, which was described as land formerly taken in and inclosed from the commons and wastes of the said manor, and was contradistinguished from another district within the manor called the *old land*, within which latter the defendant admitted that the freeholders and not the lord were entitled to the coals under their own freehold land respectively. The evidence in support of the defendant's claim was principally of two descriptions; 1st, That which went to shew that *Whichwell Slacks* was comprehended within the new land; as to which the chief evidence was that it lay within the known boundary line, and was surrounded by other farms that were within the new land, and was always so called by persons who knew the boundaries of the old and new land. 2dly, That which related to acts of ownership exercised by the lords of the manor of *Shelf* and their lessees over the coals lying within the new land; and there was also evidence received (after objection taken by the plaintiff, and overruled) as to the reputation within the manor that the right to the coals within all the new land belonged to the lord, but not to the coal under the old land. Under this second description of evidence several leases from the *Saville* family, between the years 1692 and 1736, were produced, which demised for terms of years to several persons of the name of *Woodhead*

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Woodhead all the mines and veins of coals of Sir *G. Saville*, the leſſor, then open or which might be found in all thoſe commons or waſte grounds of the ſaid Sir *G.* called *Shelf* common, or in any other grounds of him the ſaid Sir *G.* in the townſhip of *Shelf*, with liberty to dig and get the ſame; and in 1806 there was a demiſe from *R. L. Saville*, lord of the manor of *Shelf*, to *Aydon* and *Elwell* of all the veins and ſeams of coal then open or thereafter to be opened, and alſo of all mines of metal, ſtone, and ſlate, as well in and under the commons or waſte ground which lie open, as under *the new land, theretofore parcel of and incloſed from the ſame.* It alſo appeared by the court-rolls of the manor of *Shelf* from the time of *Jac.* 1. to 1787, that there were various entries of payments made and conveyances noted, viz.:

13 *Jac.* 1. Manor of *Shelf*, court baron of Sir *G. Saville. Deb. Brookſbank*, pro uno tenemento called *Whitfield Slack.*

22d *October* 1763. Manor of *Shelf*, court baron. Find *Daniel Mortimer*, who held *Lower Whichfield Slack*, has conveyed it to *John Field.*

4th *October* 1774. Manor of *Shelf*, court baron of Sir *G. Saville. Daniel Mortimer* on the jury. Among the tenants, *Daniel Mortimer*, 1*s. Lower Whichfield Slack*, or *Soper-lane End.*

2d *May* 1787. Court baron of *John Hewitt*, deviſee of Sir *G. Saville.* Under the tenants' names, *James Mortimer*, 1*s. Soper-lane End.*

It was proved by ſeveral witneſſes that the *Woodheads* and their ſervants, for a ſeries of years as far back nearly as the time of living memory, had been in the habit of driving for coals indiſcriminately within the new land, without regarding to whom the ſeveral tenements under which

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which they worked belonged, and that *Aydon* and *Elwell* ſucceeded them, and that nobody but the lord's leſſees had in fact got coals in the new land: but no coal had been got under the identical land of the plaintiff, nor had it been worked before 1810. A witneſs alſo proved that in *April* 1789, when the plaintiff's tenement (*Whichwell Slacks*), which then belonged to one *James Mortimer*, was ſold by him to one *Thomas Hurſt*, he (the witneſs) had valued the land for *Hurſt* at 140*l.*, which was the value of the ſurface only, without comprizing the minerals (coal and ſtone), which would have been worth 200*l.* more.

Wood B. told the jury, that at ſome remote period, the lord of the manor of *Shelf* might, by ſome deed now loſt, or deſtroyed by time and accident, have granted the waſtes of the manor to the then freeholders and their heirs, to incloſe to their own uſe, reſerving to the lord and his heirs the coals and minerals within thoſe waſtes; that although the deed was loſt or deſtroyed, yet the right of the lord would remain if it could be made out by evidence of long, uniform, and uninterrupted exerciſe of the right of getting thoſe coals and minerals, and the reputation and tradition of old perſons who were dead; that it was natural that the ancient freeholds exiſting before the incloſure ſhould be called *old* land, and the waſtes when incloſed ſhould take the name of *new* land. He therefore left it to them to conſider, 1ſt, whether, from the evidence of the exerciſe of the right, and the reputation, the lord had the general right to the coals under and throughout the new land: if he had, 2dly, whether the plaintiff's tenement, entirely ſurrounded by the new land, was or was not part of the new land. If they found the general right with the lord, and that the plaintiff's

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plaintiff's tenement was new land, their verdict would be for the defendant; but if they found either againſt the general right, or allowing that, if they thought the plaintiff's tenement not new land, their verdict would be for the plaintiff. The jury found generally for the plaintiff, with 33*l.* damages, without ſpecifying the particular ground of their verdict. This caſe came on upon a rule niſi obtained by *Clayton* Serjt. in the laſt term for a new trial, on the ground of its being a verdict againſt the weight of evidence, and againſt the opinion of the learned Judge at the trial, which latter ground the learned Judge now confirmed, by ſtating in his report that he rather thought the weight of evidence againſt the plaintiff on both points.

Park, *Topping*, and *Littledale* ſhewed cauſe againſt the rule, and firſt adverted ſhortly to the evidence of reputation, which they contended was not admiſſible in matters of private right, or to prove particular facts; ſuch as were the queſtions in this caſe as to the right to the coals within the new land, and as to this particular eſtate having been always called new land. [But Lord *Ellenborough* C. J. ſaid that the reputation as to whom the right to the coals belonged was not to be conſidered as reputation ſtanding by itſelf, but was accompanied with an uniform uſage and exerciſe of that right; for the fact of getting coal by the lord in the new land, did not reſt on vague or looſe evidence, but it was general, clear and abundant: as to the reputation that the eſtate was always termed *new* land, the evidence was admiſſible, in the ſame way as concerning the boundaries of a manor (*a*), to ſhew what was the boundary of the new land

(*a*) 14 *East*, 331, *Nicholls* v. *Parker*.

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within the ambit of which this particular eſtate was included; and upon this part of the cafe there was no farther diſcuſſion.] They then proceeded to the principal queſtion, whether the evidence was ſufficient to prove that the lord had the general right to the coals under the new land; as to which they ſaid that this was the firſt inſtance in which it had ever been contended, that after a clear title to a freehold of inheritance in land has been proved in the plaintiff through a long ſeries of conveyances, unfettered by any exception, it is open to the defendant not to controvert that title, but to ſet up a preſumptive exception to it by means of evidence of general uſage and reputation only. It is a general rule of law that he who is the owner of the ſoil is entitled to all the profits ariſing from it, which include as well mines as every other parcel of the land (*b*); and though it may be admitted that when a freehold is granted, exceptions and reſervations may be made in that grant, ſo as to limit the operation of the general rule of law, yet that neceſſarily implies that ſuch exceptions and reſervations muſt be made at the time of the grant; nothing leſs, therefore, than the exiſtence of ſome deed containing the exception inſiſted upon, or probable evidence that it once did exiſt, though it is now loſt, can be ſufficient to eſtabliſh a right derogatory to that freehold title which is derived to the plaintiff by grant. No deed of that ſort was attempted to be proved, nor any evidence offered to ſhew that it ever had exiſtence; and if it had, it would be moſt extraordinary that no traces of it ſhould remain with the *Saville* family: the firſt mention of any express claim on their part to the coals within the new land is

(*b*) *Co. Lit.* 4, *b.*

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in the leaſe of 1806 to *Aydon* and *Elwell*; and even admitting that ſuch a claim may be inferred from the general terms of demiſe uſed in the prior leaſes to the *Woodheads*, ſtill thoſe leaſes go no farther back than 1692, whereas the plaintiff's title to the freehold is deduced from conveyances of a much earlier date, and which are evidence of an immemorial conveyance of the land as freehold, without any exception or reſervation whatſoever. To encounter ſuch a title, therefore, ſomething more than preſumption ariſing from the mere evidence of uſage and reputation ought to be required, eſpecially where that preſumption might have been fortified by ſome proof of the deed, if any ſuch ever exiſted. As to the evidence reſpecting the ſale of the land in queſtion by *Mortimer* to *Hurſt* at a valuation which did not include the minerals, all inference ariſing from that circumſtance to the prejudice of the plaintiff's title is rebutted by the words of the conveyance itſelf to *Hurſt*, which expreſsly grant to him "all mines." [Lord *Ellenborough* C. J. obſerved that the word "coals" was not in the deed.] Upon the other point, viz. whether the plaintiff's tenement was within the new land, it was contended that the reſervation of 1*s*. lord's rent in the deed of 1655, as well as that of 8*d*. tithe-money, which though not perhaps a modus, was evidence of a conſtant uniform tithe-payment, concurred to ſhew it old land; which was confirmed by this circumſtance, that although the lord's tenants had ſearched for coal indiſcriminately within the new land, they had not in any one inſtance exerciſed this right under the plaintiff's tenement. At all events it cannot be ſaid that there was not evidence for the plaintiff, upon which the jury might deliberate and decide as they have done.

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Clayton Serjt. and *Holroyd*, contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. The only evidence on the part of the plaintiff to reſiſt the ſtrong body of proof adduced by the defendant in ſupport of the lord's right to the coal within the new land, was the preſumption of law ariſing from his being the freehold tenant of the lands under which the lord's right was ſaid to extend. But it is of univerſal experience that one perſon may have in him a freehold title to land, whilſt another has an excluſive right to the mines under it, and this is by no means an uncommon caſe in the northern counties. The only material obſervation on the defendant's caſe is, that there do not appear to be any documents to ſhew how or when the right or reſervation now claimed by the lord commenced; but that ſuch right or reſervation as to the new land did exiſt, ſtands not only on evidence of one or two inſtances of its exerciſe, but all the evidence proves that there has been an uniform exerciſe and enjoyment of it as far back as living memory will reach, firſt in the *Woodheads*, and afterwards in ſucceſſion by *Aydon* and *Elwell*, who were the leſſees under the lord; and there is not a ſcintilla of proof on the other ſide that it was ever interrupted. That to which the evidence of reputation was applied was that to which it always is applied in ſuch caſes, namely, as to the limits of the *new* land, and the general right of the lord over it. Indeed the general right of the lord over the new land has not been queſtioned; it has only been contended that there is no proof of any exerciſe of it within the particular land in queſtion: but it may be obſerved that this is not a right, like ſome others, of a nature which makes it likely to be exerciſed

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on the ſame ſpot at repeated intervals of time, but when once acted upon is more likely to be confined to the ſame ſpot until the ſubject matter is exhauſted; it cannot therefore be expected that it ſhould be proved to have been exerciſed in every place to which it may extend, for that would be proving a right to a thing which had ceaſed to be of any value. If it had been before exerciſed on the lands in diſpute, there could have been no queſtion: but the evidence of the general indiſcriminate exerciſe of it over the new land does apply by ſhewing that every part of the new land lies within the general ambit of the lord's right. The ſame objection might as well be made in the caſe of an encroachment on a waſte. It might not be proved that any acts of ownerſhip had been exerciſed by the lord upon the very ſpot, but ſhewing acts of ownerſhip upon other parts within the general ambit of the waſte has always been deemed ſufficient. There is therefore nothing in that objection. There is however evidence applicable to the particular ſpot in the circumſtance that took place upon the ſale from *Mortimer* to *Hurſt*, which ſtrongly marks that the tenant at that time conſidered his intereſt not to go beyond the ſurface. As to the reſervation contained in the deed of 1655 under the term of tithe-money, if it could be conſidered as a modus applicable to the particular tenement, it would be undoubtedly ſtrong evidence for the plaintiff: the term however is ambiguous, and may perhaps be more properly applied to a compoſition real portioned out, than to a particular modus. Without therefore anticipating the reſult of another trial, I think it is fit that this caſe ſhould be again ſubmitted to another jury, who may appreciate the weight of it more juſtly and conſiderately. The evidence quoad the enjoyment is all one way: on the other hand, the preſumption

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in favour of the plaintiff's title is ſtrong until encountered by evidence, but it ſeems to me that it has been encountered in the ſtrongeſt manner. The lord's right is evidenced by ſhewing that the ſame right was exerciſed by him over other lands ſimilarly circumſtanced.

GROSE J. agreed.

LE BLANC J. The Court in determining that there ſhould be a new trial in this caſe do not mean to withdraw the deciſion of the queſtion from the jury, but only to ſubmit it to the conſideration of another jury. There is no rule that the Court will not grant a new trial on a queſtion of fact where there has been evidence given on both ſides, but only where the evidence on one ſide does not preponderate. But where the Court ſee ſuch a preponderance againſt the verdict, they are in the habit of ſending the caſe back to another jury.

BAYLEY J. There is no contrariety of evidence in this caſe: the right to the ſurface was clearly in the plaintiff; and the evidence was extremely ſtrong to ſhew that the coal within the new land belonged to the lord. Then as to whether the plaintiff's land was ſubject to this claim, I would only aſk the former poſſeſſor of the ſame land what the lord's right in it was: and I find that in 1789 he ſold this land, and was contented to take for it 140*l.*, when the man who valued it for him thought it worth 340*l.*, including the coal; which would have been foregoing nearly three-fifths of its actual value, provided he was entitled to the minerals. That is ſtrong evidence therefore to ſhew that both the ſeller and purchaſer conſidered that they were bargaining only for the ſurface.

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To give effect to the obſervation that the conveyance between them included mines, it would be material to ſhew, if it could be ſhewn, that 140*l.* was a compenſation for the minerals, otherwiſe to be ſure the import of the evidence is ſtrong the other way.

Rule abſolute on Payment of Coſts.

Clayton Serjt. and *Holroyd* prayed that it might be without coſts, but the Court ſaid that it was not reported by the learned Judge to be a verdict ſo clearly againſt evidence, as to induce them to depart from the general rule.

SNAITH and Others *againſt* MINGAY and Others.

Friday, Jan. 29th.

THIS was an action brought under an order of the Court of Chancery againſt the defendants as indorſers of four bills of exchange, in which the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe.

Prior to and during the time when the bills were drawn and negotiated in manner hereinafter mentioned, *H. A. Bayley*, *Charles Cotterell*, and *Cornelius Inowe Wallace*, carried on, as partners, at *Waterford* in *Ireland* (where *Bayley* and *Cotterell* reſided), the trade of proviſion merchants under the firm of *H. A. Bayley* and Co. *Wallace* likewiſe carried on upon his ſeparate account and in his own name in *Wood-ſtreet* in *London*, where he reſided, the trade of a dealer in bacon, and alſo tranſacted the buſineſs of the firm of *H. A. Bayley* and Co.; but it was covenanted by the articles of partnerſhip between the partners that *Wallace* ſhould neither draw,

Where partners reſident in *Ireland* ſigned and indorſed a copper-plate impreſſion of a bill of exchange, leaving blanks for the date, ſum, time when payable, and name of the drawee, and tranſmitted it to *B.* in *England*, for his uſe, who filled up the blanks and negotiated it: Held, that this was to be conſidered a bill of exchange by relation, from the time of the ſigning and indorſing in *Ireland*, and conſequently that an *Engliſh* ſtamp was not neceſſary.

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accept, or indorſe bills in the name of the partnerſhip firm. A ſhort time previouſly to the reſpective dates of the bills *Bayley* and *Cotterell*, or one of them, at *Waterford*, ſigned and indorſed, in the name of the firm, copper-plate impreſſions of four bills of exchange, leaving blanks for the date, ſums, times when payable, and names of the drawees, and tranſmitted them in that ſtate to *Wallace* in *London*, to be uſed by him for his individual accommodation in his ſeparate trade of a bacon merchant, and not upon the partnerſhip account. The blanks were afterwards filled up by *Wallace* in *London*, who there negotiated the bills; the firſt of which was dated *Waterford*, 3d *April* 1810, and was drawn by *H. A. Bayley* and Co. upon *Roſe* and Son in *London*, payable 90 days after date to the drawer's order. The other three bills were not materially different, varying only as to the days of their date, the ſums, and times of payment, and the names of the perſons upon whom they were drawn. The ſtamps upon theſe bills were appropriate *Iriſh* ſtamps for the reſpective ſums inſerted therein, and were upon the copper-plates when tranſmitted from *Ireland*, but were not legal ſtamps for bills of exchange drawn in *England* of the ſame reſpective value. After the blanks were filled up the bills were duly accepted by the ſeveral perſons to whom they were addreſſed, and were afterwards indorſed by the defendants, at the requeſt and for the benefit of one *Edmund Cotterell*, by whom they were duly indorſed and negotiated to plaintiffs, who diſcounted the ſame in their buſineſs as bankers for a valuable conſideration, without any knowledge of the circumſtances under which the bills were drawn or filled up, or any other circumſtances connected with their antecedent negotiation. The bills were reſpectively

ſpectively preſented to and diſhonoured by the acceptors when they became payable, and due notice thereof was given to defendants, who refuſed payment, on the ground that the bills were void for want of having proper *Engliſh* bill ſtamps affixed to them.

If the Court ſhould be of opinion that the plaintiffs are entitled to recover, then the verdict to ſtand; otherwiſe to be ſet aſide, and a nonſuit entered.

Nolan, for the plaintiffs, contended that the bills were not void for want of an *Engliſh* ſtamp. The queſtion depends on ſtat. 48 *Geo.* 3. *c.* 149. *ſ.* 2., which was the ſtamp act in force at the time when theſe bills were drawn; and that queſtion is, whether theſe bills can be conſidered as inland bills within the meaning of that ſtatute. Now in order to conſtitute an inland bill, the bill muſt not only be payable, but muſt alſo be drawn in *England*; whereas here the bills were drawn in *Ireland*, at the time when they were ſigned by *Bayley* and *Cotterell*. The mere ſignature of a party to a bill amounts to an obligation upon him to pay the bill, although it is in blank at the time of his ſignature. Accordingly, in the caſe of *Ruſſell* v. *Langſtaff* (*a*), where it was objected that the indorſement having been made on a blank bill, it was to be conſidered as no bill, and it was ſo ruled at Niſi Prius, and the plaintiff was nonſuited upon the objection; the Attorney-General, who was afterwards to have ſupported the nonſuit, thought the point too clear for argument, and was obliged to abandon it; and Lord *Mansfield* C. J. obſerved, that the indorſement on a blank note was in the nature of a letter of credit for an inde-

(*a*) *Doug.* 513.

finite

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finite ſum. So here, the ſignature in *Ireland* on the blank bill was equivalent to drawing a letter of credit in *Ireland*. In *Bayley* on Bills (*a*) it is laid down, on the authority of *Collis* v. *Emett* (*b*), that if a perſon ſign his name upon a blank paper ſtamped with a bill ſtamp, and deliver it to another perſon to draw ſuch bill as he may chooſe thereon, he is the drawer of any bill to which the ſtamp is applicable which ſuch perſon ſhall draw thereon; and accordingly in *Collis* v. *Emett*, where the defendant had ſo ſigned his name, and delivered it to *Liveſay* and Co., who drew for a large ſum, and transferred it to the plaintiff, the Court gave judgment for the plaintiff on a a count alleging that the defendant drew the bill: the ſignature, therefore, is the principal act, and the ſubſequent acts are only incident and referable to it. Here the filling up the blanks by *Wallace* in *London* had reference to the authority given to him by *Bayley* and *Cotterell* in *Ireland*, and, when completed, had effect from the time of their ſignature; and this authority was not indefinite, but was neceſſarily limited by the amount of the ſtamp at the time of the ſignature, the ſtamp laws not allowing of any re-ſtamping of a bill of exchange. If then the bills are to be conſidered as virtually drawn in *Ireland*, it is clear that they ought to bear the ſtamp required by the law of that country, in order to make *Bayley* and *Cotterell*, the drawers, liable; for without ſuch a ſtamp, according to the caſes of *Alves* v. *Hodgson* (*c*), and *Clegg* v. *Levy* (*d*), they could not have been ſued upon the bills. The plaintiffs, however, are not driven to the neceſſity of maintaining that theſe bills were drawn in *Ireland*, although, on the authority of *Collis* v. *Emett*,

(*a*) P. 14. 2d edit. (*b*) 1 *H. Bl.* 313.
(*c*) 7 *Term Rep.* 241. (*d*) 3 *Campb.* 166.

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that poſition might be maintained: it is ſufficient for them that the bills were not drawn in *England*.

Scarlett, contra. It may be admitted that as far as the ſignature of the drawer is eſſential to conſtitute a bill of exchange, the bills in queſtion were perfect; but there are other requiſites equally eſſential with that of the ſignature of the drawer, ſuch as the date, ſum, and the name of the drawee, the want of any one of which will render the bill incomplete and of no effect. It becomes a bill of exchange only from the time when all theſe requiſites are perfected, and muſt therefore have a ſtamp applicable to that time and the place where it ſo becomes a bill. Here the ſignature alone was made in *Ireland*; the other requiſites were completed in *England*; the bills, therefore, are to be conſidered as *Engliſh* bills, requiring an *Engliſh* ſtamp; for the law requires a ſtamp on a bill of exchange, not on a blank paper. The ſignature of *Bayley* and *Cotterell* was in the nature of a power of attorney to *Wallace* to draw bills in their names, which he executed in *England*, and the bills were firſt iſſued there for his accommodation; ſo that the tranſaction was altogether limited to *England*. It was in effect the ſame as if *Bayley* and *Cotterell*, inſtead of tranſmitting their ſignature, had ſent an order to *Wallace* to ſubſcribe their names to the bills in *London*; in which caſe, if he had ſo done, the bills would unqueſtionably have been inland bills within the meaning of the ſtatute. But the circumſtance of their being dated at *Waterford* will not alter their nature, if in effect they firſt aſſumed the character of bills of exchange in *England*. The caſe of *Ruſſell* v. *Langſtaff* only decides that when a bill of exchange has received its formal completion, ſo as to take effect

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effect as a bill, it will bind a perſon who has previouſly indorſed it when in an imperfect ſtate. The queſtion here is not whether *Bayley* and *Cotterell* may not be reſponſible upon their ſignature, but at what time theſe bills became bills of exchange.

Lord ELLENBOROUGH C. J. It is probable, that ſitting at niſi prius I heſitated whether this inſtrument could in ſtrictneſs be conſidered as a bill of exchange, until the name of the drawee was ſupplied. The queſtion now is, when that name was ſupplied, whether it did not become by relation a bill of exchange from the time when the ſignature of the drawers, which was the obligatory act upon them, was firſt put to it. What is this caſe? A merchant reſident in *Ireland* ſends to *England* certain bills of exchange drawn on proper *Iriſh* ſtamps, and in that reſpect he limits the authority of the perſon for whoſe benefit the bills are tranſmitted. Theſe bills are ſigned with the name of the merchant in *Ireland*, indorſed with his name, and dated from a place in *Ireland*, and are tranſmitted to the correſpondent in *England* with authority to him to fill up the remaining parts of the inſtrument. The moment the blanks are filled up, does not the inſtrument by relation become the bill of the party in *Ireland*, as much as if it had been drawn in all its particulars with his own hand? It was ſo held in *Ruſſell* v. *Langſtaff*. In that caſe, at the time of the indorſement it was not a bill of exchange; but the moment the other parts were filled up by an authorized agent, then it became the bill of the party, and was conſidered as ſit to be declared on as ſuch. I remember the caſe at *Durham*, and afterwards in this court. It was aſked upon that occaſion how the allegation in the declaration "that the defendant

defendant *afterwards* indorſed the ſaid bill," could be ſuſtained. But the Court reſolved that they would ſo adjuſt the acts of the party as to give effect to the intention, and for that purpoſe held, that an indorſement, which was prior in point of time to the drawing, was to be conſidered in law as poſterior. Here the relation back is made to a time when a valid and obligatory authority, viz. the ſignature of the drawer, was impreſſed on the bill, which in *Collis* v. *Emett* was conſidered as a ſufficient drawing; and it is quite immaterial, whether the filling up the blanks, which afterwards made it a perfect bill of exchange, was done by a mere agent, or by an agent who had an authority coupled with a diſcretion. It is not ſtated that there was any fraud on the ſtamp laws of either country. The inſtrument, therefore, muſt be conſidered as a bill of exchange drawn in *Ireland*, and not as drawn in *England*.

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GROSE J. The queſtion is, whether this is to be conſidered as an *Iriſh* or an *Engliſh* bill of exchange. The caſe ſeems to me to be this: a piece of paper ſigned by a perſon in *Ireland* is given for the purpoſe of being filled up and operating as a bill of exchange; and although it was imperfect at the time when it was ſigned, yet when it became perfect by being filled up, it operated as a bill of exchange from the time when it was ſigned and intended to have ſuch operation. I conſider it therefore as an *Iriſh* bill of exchange.

LE BLANC J. This is an action againſt the indorſers of a bill of exchange; to which it has been objected, that the bill is void for want of a proper ſtamp. That brings it to the queſtion, whether this is an *Engliſh* bill.

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The party drawing the bill was a perſon bonâ fide reſident in *Ireland*, and no fraud is ſtated in the caſe. It does not appear that he drew the bill in *Ireland* with any fraudulent intent of evading the ſtamp laws, or that he went to *Ireland* for that purpoſe; but the caſe ſtates that, being reſident there he drew the bill, i. e. ſubſcribed his name in the character of drawer, and afterwards as firſt indorſer, on a paper properly ſtamped according to the revenue laws of *Ireland*, and having every mark to deſignate it as a bill of exchange. It is not a queſtion, whether it was then perfected as a bill of exchange. It certainly was deſignated as ſuch. The party in *Ireland* then ſends it over to this country with authority to his correſpondent here to inſert the day of the date, the ſum, and the name of the drawee. It comes here, therefore, as an incipient bill of exchange, and ſo far having the eſſence of a bill, as it has the name of the drawer and firſt indorſer upon it; and afterwards the party to whom it is ſent, and who has authority given him by the ſignature, addreſſes it to a third perſon as the drawee, and ſupplies the ſum and date. Whether this was a perfect bill in *Ireland* is not ſo much the queſtion as whether it was a bill drawn in *England*. I call it an incipient bill, which by the ſubſequent acts was made a perfect one: for the caſes ſhew that when a ſignature is once written to a paper which is intended to have the operation of a bill of exchange, it becomes ſuch when perfected from the time when it was ſigned, ſo as to ſupport an allegation that the party either drew or indorſed the bill (*a*). Here the tranſaction is the ſame as if the party in *Ireland* had deſired his correſpondent in *London* to fill up a bill of exchange, and ſend

(*a*) *Ruſſell* v. *Langſtaff*, *Collis* v. *Emett*.

it

it over to him, in order that he might ſign it: it differs only in this, that inſtead of having a bill ſent to him already filled up, and then ſigning his name to it, he ſigns his name firſt, and then ſends the bill to his correſpondent. 1813. SNAITH *againſt* MINGAY.

BAYLEY J. The only act to pledge the credit of the houſe of *Bayley* and Co. was the ſignature in *Ireland*. Suppoſe the perſon ſubſcribing his name as drawer had died whilſt the bill was on its paſſage, and afterwards the blanks had been filled up and the bill negotiated to an innocent indorſee; I ſhould think that in that caſe the repreſentatives of the party ſigning the bill would have been liable. This ſhews, that when the whole is filled up, it has reference to the time of the ſignature, which in this caſe was made in *Ireland*.

Judgment for the Plaintiffs.

DOE, on the Demiſe of BISH, *againſt* KEELING.

Friday, Jan. 29th.

THIS was an ejectment brought for a meſſuage and garden, on a proviſo contained in a leaſe, for re-entry for the non-performance of covenants. Plea, not guilty.

At the trial before Lord *Ellenborough* C. J. at the *Surrey* aſſizes 1811, the jury, under the direction of his Lordſhip, found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe.

By a leaſe dated the 8th of *June* 1809, and made between *Thomas Biſh* the younger (the leſſor of the plaintiff)

Where a leſſee of a houſe and garden for term of years covenanted with the leſſor "not to uſe or exerciſe, or permit or ſuffer to be uſed or exerciſed, upon the demiſed premiſes, or any part thereof, any trade or buſineſs whatſoever, &c. without the licence of the leſſor, &c." and afterwards, without the licence of the leſſor, aſſigned the leaſe to a ſchoolmaſter, who carried on his buſineſs in the houſe and premiſes: held that the aſſignment was a breach of this covenant, and the leſſor entitled to re-enter under a proviſo for re-entry for non-performance of covenants.

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of the one part, and Lady *Georgina Anne Mac Neill* of the other part, *Thomas Biſh* demiſed to *Georgina Anne Mac Neill*, her executors, adminiſtrators and aſſigns, the meſſuage and premiſes in queſtion for the term of 14 years from the 25th of *March* then laſt paſt at the yearly rent of 50*l.* The houſe is ſituated on *Richmond Green*, and the leaſe contained, amongſt others, the following covenant: "And the ſaid *Georgina Anne Mac* "*Neill*, for herſelf, her executors, adminiſtrators, and "aſſigns, doth further covenant, promiſe, and agree, to "and with the ſaid *Thomas Biſh*, his executors, admi- "niſtrators, and aſſigns, that ſhe the ſaid *Georgina Anne* "*Mac Neill*, her executors, adminiſtrators, and aſſigns, "ſhall not nor will during the ſaid term hereby granted "erect or build any new edifice or building, edifices or "buildings, on the piece or parcel of ground and pre- "miſes hereby demiſed, or any part thereof, and ſhall "not nor will at any time or times during the term con- "vert the ſame premiſes, or any part thereof, or permit "or ſuffer the ſame to be converted into or uſed as and "for a ſhop or ſhops, or to have any mark or ſhew of "trade or buſineſs thereon, or on any part thereof, *nor* "*uſe or exerciſe, or permit or ſuffer to be uſed or exerciſed* "*in or upon the ſame premiſes, or any part thereof, any trade* "*or buſineſs* whatſoever, or permit or ſuffer any ſale or "ſales by public auction in or upon the ſaid demiſed "premiſes, or any part thereof, without the licence or "conſent of the ſaid *Thomas Biſh*, his executors, admi- "niſtrators, or aſſigns, for theſe purpoſes reſpectively "firſt had and obtained."

On or about the 24th of *June* 1809 Lady *Mac Neill* aſſigned her intereſt in the premiſes to the defend-

ant, who in purſuance of ſuch aſſignment entered upon and took poſſeſſion of them.

The defendant is a ſchoolmaſter, and immediately upon taking poſſeſſion of the premiſes opened a ſchool in the houſe, and publiſhed and diſtributed hand-bills containing the particulars of the ſchool, the nature of the inſtruction furniſhed, and the terms upon which pupils were boarded and educated by the defendant. No licence or conſent was granted by *Thomas Biſh* to Lady *Mac Neill* to permit or ſuffer the defendant, nor to the defendant, to open the ſchool in the houſe. There are from 50 to 60 boys in the ſchool, but no board or ſign whatever is affixed to the houſe or premiſes, nor is there any mark or ſhew of trade or buſineſs on the premiſes, or any part thereof.

The queſtion for the opinion of the Court is, Whether the keeping and carrying on the ſaid ſchool by the defendant upon the premiſes is a breach of the covenant or not. If the Court ſhall be of opinion that the keeping and carrying on the ſaid ſchool is a breach of the covenant, the verdict is to ſtand. And if the Court ſhall be of opinion that it is not a breach of the covenant, a nonſuit is to be entered.

Bolland, for the leſſor of the plaintiff, adverted to the general rule for the conſtruction of covenants, viz. that they ſhall be conſtrued according to the intention of the parties covenanting; and if there be any ambiguity, the covenant ſhall be taken moſt ſtrongly againſt the covenantor. He then contended that it was the intention of the original parties to this deed that the houſe ſhould continue a private houſe; the fulfilment of which intention the rank and ſtation of the leſſee ſecured to the

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leſſor, ſo long as ſhe remained tenant. The queſtion then is, whether conſtruing the words "trade or buſineſs," according to the intention of the parties, they do not comprehend the occupation of a ſchoolmaſter. It has indeed been conſidered that a ſchoolmaſter as ſuch (*a*) is not a trader within the bankrupt laws; but the words "trade or buſineſs" uſed in this covenant are not intended to be confined within ſo narrow a conſtruction: indeed, the covenant is expreſsly extended farther, viz. to any *ſhew* of trade or buſineſs. Although the buſineſs of a ſchoolmaſter is commonly denominated a profeſſion, that is only as denoting it to be a buſineſs of a more liberal deſcription; but it may nevertheleſs be deemed in many reſpects very ſimilar to a trade; and eſpecially in reſpect of the inconvenience likely to reſult to the owner of the premiſes within which ſuch a buſineſs is carried on, which may be as great as that which many trades would occaſion.

Adolphus, contrà, maintained that this was merely a queſtion of conſtruction, and not what was the probable expectation of the leſſor; and that although the rule for the conſtruction of covenants was, that they are to be taken moſt ſtrongly againſt the party covenanting, yet there was another rule, which applied to this caſe, viz. that a party ſhall not incur a forfeiture without ſtrict words impoſing ſuch forfeiture. The words of this covenant, upon which the queſtion turns, are "trade or buſineſs;" the firſt of which is a term of a ſpecific meaning, the latter of a general one. But it has been laid down in *The Archbiſhop of Canterbury*'s caſe (*b*), and in *The Counteſs of Bridgewater* v. *The Duke of Bolton* (*c*), that

(*a*) *Skinner*, 292. 3 *Mod.* 330. (*b*) 2 *Rep.* 46. (*c*) 6 *Mod.* 107.

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where a ſpecific term is uſed in the firſt place, it ſhall receive no extenſion by a ſubſequent general term. Here then the preceding word "trade" ſhall not be extended by the ſubſequent word "buſineſs," according to the rule laid down in thoſe caſes; and ſuch a conſtruction is fortified in this caſe by the words being uſed in conjunction with the words "ſhop, or ſhew of trade or buſineſs;" which ſhew that the intention of the parties was to prohibit only ſuch buſineſs as could not be carried on without a public exhibition. If this is to be conſidered as a trade, taking one or two pupils would be equally within the covenant, which would be a moſt inconvenient conſtruction.

Lord ELLENBOROUGH C. J. I own I have no doubt that this is a buſineſs within the meaning of the covenant, and one which is likely to create as much annoyance as can be predicated of almoſt any buſineſs. It ſurely cannot be contended, that the noiſe and tumult which ſixty boys create, are not a conſiderable annoyance, as well to the neighbourhood as to the houſe, from which any landlord may fairly be ſuppoſed to be deſirous of redeeming his premiſes; and the exhibition too of the boys may be ſaid ſomewhat to reſemble a ſhew of buſineſs, within the terms of the covenant. The intention of the covenant was, that the houſe ſhould not be converted to any purpoſes which might be likely to annoy the neighbourhood, and by that means to depreciate its value at any future period, when another tenant might be required. But a buſineſs of this kind would neceſſarily produce inconvenience to the neighbourhood, both by the diſturbance which the inmates of the houſe would create, and by drawing to the ſpot a large reſort of perſons,

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ſuch as the parents and friends of the children; and it is therefore that ſpecies of buſineſs which would have moſt prominently offered itſelf as fit to be excluded. It is certain that the words of the covenant in ſome places relate to that ſpecies of trade which is carried on by means of ſale and an open exhibition of trade; but can we say that the word "buſineſs" does not comprize ſuch an occupation as the preſent? It ſeems to me that we cannot; and as to the intention, if the party had it in his contemplation either to ſecure his own privacy or that of the neighbourhood, there can be no doubt that this is a ſpecies of buſineſs that he would have particularly excluded. He has not done ſo by expreſs words; but ſtill the words are ſufficient, and the intention is clear.

Grose J. I think this was a wiſe proviſion on the part of the landlord; there is not any buſineſs more likely to injure a houſe than that of a ſchoolmaſter; and it was proper, by way of ſecuring the neighbourhood from annoyance.

Le Blanc J. I do not think that the meaning of the parties can be fairly confined to trade, becauſe they have uſed in addition the word "buſineſs;" which muſt be intended of ſomething not falling within the deſcription of trade. The queſtion then is, whether a ſchool, to which the public at large are invited to ſend their children, does not fall within the words of the covenant. I think it does; and if ſo, there is no doubt it falls within the miſchief intended to be provided againſt.

Bayley J. concurred.

Judgment for the plaintiff.

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The KING *against* The Mayor and Citizens of CHESTER.

Wednesday, Feb. 3d.

PARK moved for a mandamus to the mayor and citizens of *Cheſter*, to hold a general aſſembly for the election of 24 aldermen and 40 common-councilmen, and to proceed to ſuch elections. The queſtion meant to be raiſed was whether the elections of theſe officers ought to be annual. By a charter of incorporation granted by King *Henry* the Seventh, in the 21ſt year of his reign, to the citizens and commonalty of *Cheſter*, and confirmed by a charter in the 16th of *Elizabeth*, it was granted (inter alia) in the following terms: "Volumus etiam damus & concedimus pro nobis & heredibus noſtris præfatis civibus & communitati heredibus & ſucceſſoribus ſuis, quod ipſi et ſucceſſores ſui in perpetuum *ſingulis annis ſucceſſivis* viginti quatuor concives civitatis prædictæ in aldermannos nec non quadraginta alios cives ejuſdem civitatis pro communi conſilio civitatis illius eligere facere et creare *poſſint*." Then followed a proviſion for electing a recorder, and there were other proviſions alſo for electing annually a mayor and the other corporate officers. The only inſtances of uſage which were ſet forth in the affidavit in ſupport of the motion, were in the year 1693, and the two following years, in each of which an election of 40 common-councilmen was ſtated to have taken place. The affidavit alſo ſet forth a return made by the mayor and citizens to a mandamus granted by this Court in the year

Where a charter of incorporation of *H. 7.*, granted to the citizens and commonalty in theſe words: "Quod ipſi & ſucceſſores ſui in perpetuum *ſingulis annis ſucceſſivis* 24 concives civitatis in aldermannos, nec non 40 alios cives ejuſdem civitatis pro communi conſilio civitatis illius eligere facere & creare *poſſint*;" and it appeared that in the year 1693 and the two following years, ſucceſſive elections of the 40 common-councilmen had been made, ſince which time the uſage had been not to elect the aldermen or common councilmen annually; the Court refuſed a mandamus which was applied for in order to raiſe the queſtion againſt the uſage whether the elections of thoſe officers ought to be annual, there being another remedy open to the parties making this application.

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The KING *againſt* The Mayor and Citizens of CHESTER.

1693, on the application of *R. Brett* and eight others to be reſtored to the office of common-councilmen, to which the mayor and citizens made a return that it was granted by the ſaid charter of *H.* 7. that the citizens and commonalty *ſhould or might* annually elect 40 citizens for the common council, and that the ſaid *R. Brett* and the eight others were duly elected and continued in the office of common-councilmen for one year, and at the expiration of that year other citizens were elected in their ſtead; which return as was alleged was never falſified or vacated.

To a queſtion put by *Le Blanc* J., *Park* admitted that the uſage with reſpect to the election of aldermen and common-councilmen ſince the times mentioned in the affidavit had been contrary; but he relied on the express words of the charter of *H.* 7., which charter he ſaid had been confirmed in *Rex* v. *Amery* (*a*). [Lord *Ellenborough* C. J. The words of the charter are not compulſory; they are eligere poſſint, *i. e.* they have power, but are not compelled to elect. It is an extremely unuſual practice, I believe, in corporations, as founded either upon uſage or charter, to elect all the corporate officers annually.] It is ſo at *Scarborough*, and the practice was upheld by mandamus from this court (*b*).

Lord ELLENBOROUGH C. J. Beſides the *Scarborough* caſe, where the uſage prevailed, there was another caſe I believe in the time of Lord *Kenyon*, where an uſage had prevailed I may ſay almoſt againſt the words of the charter; but the Court would not interfere againſt a

(*a*) 2 *T. R.* 515. 4 *T. R.* 122

(*b*) *Str.* 1180. The caſe of the Corporation of *Scarborough*.

long

long continued uſage upon the words of a charter which were in any degree doubtful. Here the uſage has been uniform for upwards of a century, and is not inconſiſtent with the words of the charter. I am not therefore for diſturbing it at this day by granting the rule, eſpecially where another remedy is open to the parties.

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Per Curiam (*c*), Rule refuſed (*d*).

(*c*) *Groſe* J. was abſent, and continued ſo during the remainder of the term.

(*d*) *Stra.* 625. *Foot* v. *Prowſe.*

HASLOPE *againſt* THORNE.

Wedneſday, February 3d.

In an affidavit to hold to bail, the plaintiff's clerk may ſtate his place of abode to be the office where he is employed the greater part of the day, though at night he ſleeps at another place.

UPON a rule niſi for delivering up the bail-bond to be cancelled, and entering a common appearance for the defendant, upon the ground that the affidavit to hold to bail did not contain the deponent's true place of abode (*a*), the affidavit ran thus: "*A. B.*, clerk to *Launcelot Haslope*, of *America-ſquare*, in the city of *London*, ſhip-inſurance agent, maketh oath and ſaith," &c.

Abbott, who oppoſed the rule, relied on this being the uſual form of ſuch affidavits, upon which the Court had been in the habit of acting for a length of time.

Bowen, in ſupport of the rule, contended that place of abode meant the place where the perſon uſually ſlept,

(*a*) By rule of *Mich.* 15 *Car.* 2. it is ordered that the true place of abode and the true addition of every perſon who ſhall make affidavit in court here, ſhall be inſerted in ſuch affidavit.

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which he ſaid in this caſe was at *Camberwell* and not in *London*.

Lord ELLENBOROUGH C. J. ſaid that the words "place of abode" did not neceſſarily mean the place where the deponent ſleeps; that the object of the rule of court was to aſcertain the place where the deponent was moſt uſually to be found, which in the preſent caſe was the office at which he was employed during the greater part of the day, and not the place whither he retired merely for the purpoſes of reſt. It is the ſettled form of almoſt all the affidavits ſwearing to ſervice.

LE BLANC J. added, that it had been the conſtant practice to receive affidavits in this form.

Per Curiam, Rule diſcharged.

Thurſday, Feb. 4th.

MILBORN *againſt* COPELAND.

A writ of error in parliament may be non proſſed without carrying over the tranſcript to the court of error.

IN this caſe the defendant brought a writ of error returnable in parliament, and was thereupon ruled to tranſcribe, and he accordingly paid the tranſcript money, but the tranſcript was not carried over in the laſt ſeſſions to the Houſe of Lords. In this ſeſſions the defendant was informed that the tranſcript was ready to be carried over; whereupon he non-proſſed his own writ of error. A rule having been obtained for ſetting aſide the judgment of non pros for irregularity,

Richardſon ſhewed cauſe againſt it, contending that the defendant was at liberty, according to the practice, to non pros

pros his own writ of error in this case, and he cited *Salt v. Richards* (a).

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MELBORN *against* CORELAND.

Littledale, in support of the rule, urged that according to the case of *Salt v. Richards*, if the defendant was at liberty to non pros his own writ without carrying over the transcript to the court of error, the plaintiff would thereby be deprived of his costs.

Lord ELLENBOROUGH C. J. It is the constant and established practice, and I find upon enquiry from the officers that the usage has prevailed without exception for 30 or 40 years.

LE BLANC J. added, that the same practice was allowed in the Exchequer Chamber.

Per Curiam, Rule discharged with Costs.

(a) 7 *East*, 111.

PRICE *against* HOLLIS.

Thursday, Feb. 4th.

THIS was an action tried before *Chambre* J. at the summer assizes 1812, for the county of *Southampton*, for money had and received, and on an account stated. The object of the action was to recover the sum of 55*l.*, part of the money taken by the defendant (under-sheriff of *Hampshire*) as poundage on executing a writ of elegit. The defendant had taken poundage on the whole debt instead of computing it upon the annual value of the

Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed stat. to be compared with the parliament-roll before the matter was settled, under a doubt whether the statute was not misprinted.

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eſtate extended, contending that although writs of elegit are mentioned in the recital of the 16th ſection of ſtat. 3 *G.* 1. *c.* 15., yet as they are omitted in the enacting part, the ſheriff's right to full poundage under the former ſtatute is not reſtrained by the 3 *G.* 1. It was proved that the parties had agreed that a caſe ſhould be laid before a gentleman of the profeſſion for his opinion, and that they would be bound by ſuch opinion. The opinion was given by that gentleman in favour of the ſheriff's claim, but he expreſſed a doubt whether the variance between the recital and the enacting part, in the latter of which writs of elegit are omitted, might be any thing more than a miſprinting of the ſtatute; and recommended that the printed ſtatute ſhould be compared with the parliament-roll before the matter was ſettled. It was contended that the under-ſheriff had no right to the full poundage, but was reſtrained by the 3 *G.* 1. *c.* 15. *ſ.* 16., and that the opinion given was founded upon a miſconſtruction of the ſtatute; and farther that as it was a doubtful and not a deciſive opinion, the plaintiff was not bound by it, but was at liberty to litigate the queſtion in this action. A verdict was taken for the plaintiff, upon an underſtanding that the defendant was to bring the matter before the Court; and accordingly in the laſt term

Gaſelee obtained a rule niſi for a new trial, upon the point whether the opinion was final or not.

Pell Serjt. and *E. Lawes*, who ſhewed cauſe, maintained that the opinion was not final, inaſmuch as it profeſſed to doubt the accuracy of the words of the printed ſtatute, and recommended a farther ſtep to be

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taken before the matter was ſettled, in order to remove that doubt, viz. the comparing the printed ſtatute with the parliament-roll; and therefore until that compariſon was made, the opinion reſted upon an imperfect ſtatement, and could not have a binding effect: and upon examination it might turn out that the printed ſtatute was incorrect, and it was incumbent on the defendant to ſhew that the words of the ſtatute on which he relied had not been miſquoted.

But the Court (*a*) were clear that the opinion was poſitive and deciſive, notwithſtanding the recommendation that the parliament-roll ſhould be ſearched. The parties had agreed to abide by that opinion, and when given it was in the nature of an award, and became final between them, and the Court would not look into it to ſee whether it was ſtrictly right. If the ſtatute was miſprinted, it was incumbent on the plaintiff to ſhew that fact. Not having done ſo, it muſt be taken to be correct.

Rule abſolute.

Gaſelee was to have ſupported the rule.

(*a*) Lord *Ellenborough* C. J. had left the Court.

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Thurſday, Feb. 4th.

FALLICK *againſt* BARBER.

Where an advertiſement reſpecting a ſtolen child promiſed a reward to the perſon who would give information whereby the child was, ſo as that he might be reſtored to his parents, and the plaintiff communicated to the defendant her ſuſpicion where the child was, in order to put the matter into his hands for his benefit, if he choſe to run the riſk, and the child was afterwards reſtored to its parents by the exertions of the defendant acting upon the plaintiff's communication; Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it.

THIS was an action for money lent, money paid and expended, money had and received, and on an account ſtated, which was tried before *Chambre* J. at the laſt aſſizes for the county of *Southampton*.

The object of the action was to recover a reward, or a portion of a reward of a hundred guineas, which had been offered by public advertiſement for the diſcovery of a child that had been ſtolen from its parents, which reward had been paid to the defendant. The advertiſement, dated the 15th *December* 1811, was intituled, "100 guineas reward;" and after the uſual deſcription of the child and the woman with whom it had been laſt ſeen, concluded thus,

"Whoever will give information where the child is, ſo as that he may be reſtored to his parents, ſhall receive the above reward of 100 guineas, to be paid (on the child being reſtored), by the churchwardens of the pariſh of *Saint Martin Ongar*, 29, *Saint Martin's-Lane*, *Canon-ſtreet*." The child in queſtion was at this time in the cuſtody of a Mrs. *Magneſs*, at *Goſport*, where the plaintiff and defendant reſided. The plaintiff having been employed to work for *Magneſs*, obſerved the child at her houſe, and knowing that ſhe (*Magneſs*) had never had a child, communicated to the defendant her ſuſpicion that this might be the ſtolen child, at the ſame time obſerving that ſhe had told this to the defendant in order to put it into his hands for his benefit, if he choſe to run the riſk; that he was to do as he liked, but as ſhe apprehended it would injure her, ſhe gave

him the information under a pledge of ſecrecy. In conſequence of the defendant's exertions the child was reſtored to its parents, and the defendant received the reward of 100 guineas from the magiſtrate at *Goſport*, to whom it had been tranſmitted. There was no doubt that the defendant's exertions were the immediate cauſe of the diſcovery; and *Chambre* J. in his obſervations to the jury, expreſſed an opinion that the plaintiff's communication of her ſuſpicion to the defendant, under the circumſtances and in the way in which it was made, was not ſuch information as the advertiſement required; but they found a verdict for the plaintiff with 30*l.* damages.

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FALLICK *againſt* BARRETT.

A rule niſi having been obtained by *Gaſelee*, in laſt *Michaelmas* term, for a new trial,

Pell Serjt. and *Bayly* ſhewed cauſe, and contended that the jury by their verdict had decided that the plaintiff was the perſon who led to the diſcovery, and therefore in ſtrictneſs ſhe was entitled to the whole reward; but although the jury have given only a part, when they would have been authorized by law to give the whole, it does not therefore follow that it is competent to the defendant who wrongfully retains the whole, to impugn the verdict on that account. Perhaps indeed as there can be no doubt that the plaintiff contributed information material to the diſcovery, the verdict is maintainable as it ſtands, upon the ſame principle that an action is maintainable by one of ſeveral contributors to a ſweepſtakes againſt the ſtakeholder to recover the ſhare of his contribution. Here the jury have found what ſhare is due to the plaintiff; and if it appears that ſhe

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ſhe is entitled in equity and good conſcience, at leaſt to a portion of the reward, the Court will not diſturb the verdict, according to the caſe of *Deerly* v. *The Dutcheſs of Mazarine* (*a*), *Edmondſon* v. *Machell* (*b*), and *Cox* v. *Kitchin* (*c*), in which latter caſe the rule was laid down to that extent by *Buller* J., even where the verdict is contrary to law.

Gaſelee, contrâ, ſtopped by the Court.

LE BLANC J. (*d*). I think that there ought to be a new trial. It ſeems to be admitted that the verdict is againſt law; and I do not accede to the propoſition that it is agreeable to equity and good conſcience, for it is clear that the plaintiff never meant to be the diſcoverer, on the contrary, ſhe declared, that ſhe was apprehenſive it might injure her, and that ſhe would put it into the defendant's hands for his benefit. On the part of the defendant there is not any undertaking, either expreſs or implied, to allow the plaintiff a ſhare of what he might recover; indeed it is negatived by the caſe which ſtates that it was told to him for his benefit. The plaintiff therefore is not entitled to any portion of the reward. I agree with the law as laid down by the counſel for the plaintiff, that if ſhe had been entitled to the whole, I would not have ſet aſide the verdict at the inſtance of the defendant, becauſe a part only was given, but in my view of the caſe the plaintiff was not entitled to any part.

(*a*) 2 *Salk.* 646. (*b*) 2 *T. R.* 4. (*c*) 1 *Boſ. & Pull.* 338.
(*d*) Lord *Ellenborough* C. J. was abſent.

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BAYLEY J. The party promising to pay the reward, which consisted of one entire sum, could only be liable to one action at the suit of the person who gave the information whereby the child was restored to its parents. The plaintiff was not that person, she had given no such information to the party promising the reward, but only to the defendant, by whose exertions the child was restored; she therefore could not have maintained any action upon the original promise. Then as to her claim to contribution, it appears that she communicated her suspicion as a secret to the defendant, *for his benefit*, if he chose to run the risk, which she declined. It is impossible after this to say that the plaintiff has any right to call on the defendant for any part of the money.

Rule absolute.

LANG and Another, Assignees of BAZELEY, a Bankrupt, *against* GALE.

Thursday, Feb. 4th.

ASSUMPSIT: the declaration stated that *Christopher Savile* was seised in fee of a messuage with the appurtenants, situate at *Oakhampton* in the county of *Devon*, as mortgagee thereof, subject to redemption by

The word month may mean lunar or calendar month, according to the intention of the contracting parties: therefore where upon a sale of land on the 24th of *January*, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of *June*, making a period of precisely five calendar months from the date of the sale and conditions, the word months was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with respect to it's delivery within the precise time.

the

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the plaintiffs as assignees of *Bazeley*, on payment of 700*l.* and interest: that the plaintiffs were entitled to the equity of redemption, and the premises were in the occupation of *Bazeley*: that *Savile* and the plaintiffs being so seised, on the 24*th of January* 1811 expósed the fee-simple of the premises to sale by auction on the following terms: (inter alia) That an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, and if he should think proper to take counsel's opinion, or compare the abstract with the title deeds, he should be at the expence thereof, and should return the abstract with or without his approbation at the end of two months from the date thereof: that a draft of the conveyance should be delivered to the purchaser or his attorney *within three months* from the date thereof, and should be delivered to Mr. *Collins* within four months from the date thereof, and that the remainder of the purchase-money should be paid on the 24*th of June* then next, when the purchaser should receive his conveyance duly executed by all parties, to be prepared by Mr. *Collins* at the expence of the purchaser. That the purchaser should be in the perception of the rents and profits of the premises from the 24th of *June*, on payment of the remainder of the purchase-money, and not otherwise: that if the purchaser should neglect to comply with all or any of the conditions, the deposit-money should be forfeited, and the sellers at liberty to resell the premises, &c. The declaration then stated, that by agreement in writing between the plaintiffs and the defendant, the defendant agreed to purchase the premises at the price of 1450*l.*, subject to the said conditions, and the plaintiffs agreed to sell the same to him at the said price and on the same conditions. It then averred

averred mutual promiſes of performance, and that afterwards within a fortnight from the date of the ſaid conditions, an abſtract of the title of the plaintiffs and *Savile* to the premiſes was delivered by the plaintiffs to the defendant, and afterwards, *within three months of the date of the conditions, a draft of a proper conveyance of the premiſes was delivered by the plaintiffs to the defendant's attorney;* and the plaintiffs went on to aver that from thence until and on the 24th of *June* they were ready and willing to have performed the reſt of the conditions on their part to be performed, of which the defendants had notice. The breach aſſigned was that the defendant, after the delivery of the draft and before the 24th of *June*, by his attorney returned the ſame, and on the 24th of *June* refuſed to complete the purchaſe, &c. The defendant pleaded the general iſſue.

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LANE *againſt* GALE.

At the trial before *Chambre* J. at the laſt aſſizes at *Exeter*, it appeared that the premiſes were ſold by auction to the defendant on the 24th *January* 1811 at the ſum of 1450*l.*, who then ſubſcribed his name to the contract; that on the 7th of *February* following, an abſtract of the title was delivered to him, which after ſome heſitation he received, and which being returned on the 9th by the defendant's attorney with an indorſement made thereon, a fuller abſtract was furniſhed him. The *draft* of the conveyance was *delivered on the 24th of April* 1811, and on the 30th the defendant declared that he would have nothing more to do with the contract, and was unable to perform it. It was objected that the plaintiffs could not maintain the action, not having complied with the terms of the conditions, by delivering the draft of the conveyance within the time ſtipulated; viz. three months from the date, which date was the 24th

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of *January*. The delivery was on the 24th of *April*, three calendar months after the date; but it was contended, that the computation was to be made by lunar months. This objection was saved for the opinion of the Court, subject to which a verdict was given for the plaintiffs. *Pell* Serjt. accordingly in the last term obtained a rule nisi for entering a nonsuit.

Lens Serjt., and *Bayly*, now shewed cause, and admitted the general rule that in legal proceedings the term month is to be intended lunar and not calendar, the reason of which is this, that the common law computes time according to the lunar month; but in ecclesiastical matters the computation is by the calendar month; and therefore where a statute speaks of six months, in a matter which concerns ecclesiastical proceedings it shall be computed by calendar months (*a*), and so the words tempus semestre in the stat. of *West*. 2. *c*. 5. concerning quare impedit were computed (*b*). This shews that the word month may be understood either as lunar or calendar according to the subject-matter to which it refers, or the understanding of the parties using it. The question then is, whether by reference to the whole context of this agreement it does not appear to be the intention of the parties that it should be construed as calendar. Such a construction arises almost of necessity out of the contract; for it is to be completed, according to the limits prescribed by the parties themselves, on the 24*th of June*, which is precisely five calendar months from the day of the sale. The parties therefore must have had it in their contemplation to regulate the inter-

(*a*) 2 *Roll. Abr.* 521. 51. *Hob.* 179. *Copley* v. *Collins.*
(*b*) 6 *Rep.* 61. *Catesby's* case.

mediate

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mediate periods of its performance by the ſame ſtandard which they have choſen for its final completion, and accordingly when they uſed the word months ſimply, to have thereby intended calendar months. But ſuppoſing this a wrong conſtruction of the word, and therefore that the delivery of the draft of the conveyance on the 24th of *April* ſhould be deemed out of time, ſtill the contract ſubſiſts, unleſs it can be ſhewn that a delivery within the ſpecified time was a condition precedent. There are no words of condition annexed to this particular ſtipulation, and it does not ſeem eſſential to the nature of this contract that it ſhould be conſtrued as ſuch, and the party by not objecting to the delivery at the time, has ſhewn that he conſidered it otherwiſe; the ſubſtance of the ſtipulation was only to ſecure to the purchaſer a delivery within a reaſonable time. In *Hall* v. *Cazenove* (*a*), where a charter-party contained a covenant by the owner that the ſhip ſhould ſail on a ſpecified day, and the owner afterwards brought an action of covenant for the freight, it was held that he need not aver that the ſhip ſailed on that day, although the defendant (the freighter) covenanted to pay the freight in conſideration of every thing above mentioned: that caſe, therefore, is a ſtrong authority in favour of the plaintiff. At all events the defendant has diſpenſed with the performance of the condition, by not objecting at the time when the draft was delivered to him.

Pell Serjt., and *Gifford*, contrà, denied the inference attempted to be raiſed on the other ſide from the circumſtance of the parties having fixed upon the 24th of *June*

(*a*) 4 *Eaſt*, 477.

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as the final limit of the contract; indeed, they contended that the inference was directly the other way, because it was clear by fixing that period, that where they meant calendar months they have so expressed it. If the context is to be resorted to in order to explain the meaning of the word months, it is observable that they have limited the performance of one of the conditions to a fortnight, a period which has relation only to lunar computation. It may then at least be assumed that there is nothing to shew that the parties intended to use the word month in a sense different from its ordinary acceptation in legal instruments, which is confined to lunar months; and if so the delivery of the draft of the conveyance on the 24th of *April* was out of time. The only remaining question is, whether a delivery within the time specified be not a condition precedent. The condition was imposed by the vendors upon themselves for the benefit of the purchaser, and is the same thing in effect as if they had agreed to deliver him a specific thing upon payment of a sum of money, in which case it never could be contended that he would be bound to pay the money before delivery of the thing. Here the precise time for the delivery being fixed, it is not competent to the plaintiff to substitute another time; but the defendant has a right to insist upon performance in the manner agreed upon. If so, the plaintiff has failed in proving his averment, which for the reasons above alleged, is a material one. As to the argument that the defendant has discharged the plaintiff from the performance by not insisting upon it at the time of the delivery of the draft, it is sufficient to say that if the plaintiff would have availed himself of that discharge, he should have framed an averment to that

effect according to the mode adopted in *Jones* v. *Barkley* (*a*). He cannot do it under the preſent averment.

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LE BLANC J. (*b*). Several points have been agitated in the diſcuſſion of this caſe, but I do not feel it neceſſary to go into all of them, becauſe, upon the firſt, the Court are clearly of opinion in favour of the plaintiff. I allude to the point reſpecting the time within which the draft of the conveyance was agreed to be delivered to the purchaſer. It is very true, as has been ſtated, that in matters temporal the term month is underſtood to mean lunar month, whilſt in matters eccleſiaſtical it is deemed calendar, becauſe in each of thoſe matters a different mode of computation reſpectively prevails: the term, therefore, is taken in that ſenſe which is conformable to the ſubject-matter to which it is applied. Still in matters of contract the queſtion will ever be, what was the intention of the contracting parties at the time when they made uſe of the word. Looking at this caſe, I think the parties clearly had in their contemplation calendar and not lunar months. The date of the ſale is the 24th of *January*, and the conditions provide for the delivery of an abſtract of the title to the purchaſer within a fortnight from that date, which is to be returned by him at the end of two months. The draft is then ſtipulated to be delivered within three months, which is to be re-delivered to *Calling* within four months, and final payment to be made on the 24th of *June* following. This completes a period of exactly five calendar months from the date of the ſale, and ſhews clearly that the parties had in their contemplation, in the prior limitations of two, three, and

(*a*) *Doug.* 684. (*b*) Lord *Ellenborough* C. J. was abſent.

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four months, the same respective portions of time as in the ultimate limitation, which is calendar and not lunar months. As to the other point, it is clear that it is a condition-precedent that a draft of the conveyance should be delivered to the purchaser, the question is, whether it must be done by a particular day. It is not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule that where a condition does not go to the whole consideration (*a*) of the contract, but to a part only, it is not a condition-precedent.

BAYLEY J. I am of the same opinion upon both points. It was not a condition-precedent that the draft should be delivered by a particular day; for I do not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time. Upon the other point it seems to me, on referring to the particulars of sale, that months were intended as calendar months; and this construction is a beneficial one for the defendant, for by the conditions he is allowed two months for examining the abstract, and one for the draft of the conveyance; therefore, by construing them calendar the time allowed him is enlarged beyond the period of lunar months.

Rule discharged.

(*a*) See *Havelock* v. *Geddes*, 10 *East*, 564.

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PINERO, Gent. *againſt* HUDSON.

Friday, Feb. 5th.

ABBOTT ſhewed cauſe againſt a rule obtained by *Eſpinaſſe* for ſetting aſide the ſervice of a writ of attachment for irregularity. The irregularity alleged was in the Engliſh notice, which was to appear at the return of the writ, being the 28th day of *November* 1812, which dates were in figures, and not in words at length, which it was contended the ſtatute of 5 *G.* 2. *c.* 27. *ſ.* 1. 4. required. He contended that according to the caſes of the *Weavers' Company* v. *Forreſt* (*a*), *Elliott* v. *Parratt* (*b*), and *Steel* v. *Campbell* (*c*), notices were not held ſo ſtrict.

The *Engliſh* notice to appear at the foot of a writ of attachment muſt contain the date of the day of appearance in words at length, not figures.

BAYLEY J. (the only Judge in court) was of opinion, that as by the firſt ſection of the ſtatute it is required that the proceedings ſhall be written *in words at length*, the fourth ſection, which requires that upon every copy of ſuch proceſs there ſhall be written *in like manner* an Engliſh notice, muſt by reference to the firſt ſection be taken alſo to mean *in words at length*, and therefore made the

Rule abſolute.

(*a*) *Str.* 1232. (*b*) *Barnes*, 425. (*c*) 1 *Taunt.* 424.

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Friday, Feb. 5th.

EDWARDS and Another *against* BOBBIT.

A bond given to parish officers reciting that *B.* had taken a house in the parish for a term of 7 years, and conditioned to indemnify the parish against any charges which they might sustain on account of *B.* and his family becoming inhabitants of and belonging to the parish, is not discharged by *B.*'s purchasing an estate of the value of 30*l.* in the parish, and residing on it upwards of 40 days, after the expiration of the 7 year's lease.

DEBT by plaintiffs as survivors of *John Watson*, on bond dated 3d *October* 1794 for 300*l.* The defendant craved oyer of the bond, which was given by the defendant as surety for one *William Turner* to *Edwards*, *Watson*, and *Cook*, churchwarden and overseers of the poor of the parish of *Dennington* in *Suffolk*. He also craved oyer of the condition, by which, after reciting that *Turner* had taken a lease of the *Queen's Head* inn belonging to the said parish, for 7 years from the 10th *October* 1794; and that he having a wife and six infant children (naming them), it was agreed between him and the parish officers and principal inhabitants that notwithstanding *any* settlement he and his family might gain by becoming inhabitants *of the parish*, he should with a sufficient surety enter into a bond in a penalty of 300*l.* to the parish officers, in order to indemnify them against any charges which they might sustain on account of his (*Turner*) and his family becoming inhabitants of and belonging to the parish; it was therefore agreed that *Turner* and the defendant or either of them should from time to time and at all times thereafter fully indemnify as well the abovenamed churchwarden and overseers of the said parish of *Dennington* and the collectors for the poor of the said parish, which then were or thereafter should be for the time being, and their successors and every of them, as also all other the inhabitants and parishioners of the same parish and every of them for the time being, of and from all charges which should arise in respect of *Turner* and his wife and their said children, or any child

or

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or children wherewith the ſaid wife then was or thereafter might be pregnant, and alſo of and from all actions, &c. touching the matters aforeſaid or any of them. The third plea then ſtated, that after the expiration of the term of 7 years in the condition mentioned, to wit, on the 10th of *December* 1807, at &c., he the ſaid *William Turner bonâ fide* purchaſed an eſtate ſituate in the ſaid pariſh of *Donnington* for a ſum of money exceeding 30*l.*, and *bonâ fide* paid the money for the ſame; and that afterwards (to wit), on &c., and for a long ſpace of time exceeding the ſpace of 40 days after ſuch purchaſe and payment, *Turner* continually reſided in and occupied the ſaid eſtate, to wit, at &c., and that neither the churchwardens and overſeers, nor the officers, pariſhioners, or inhabitants of the ſaid pariſh, nor any or either of them, at any time after the making of the ſaid writing obligatory, and before *Turner* had reſided in and occupied the ſaid laſt-mentioned eſtate for longer than the ſpace of 40 days, was or were in any manner damnified in reſpect of *Turner* and his wife or any of their children, or touching any of the matters mentioned in the condition of the bond. Demurrer and Joinder.

Murryat, in ſupport of the demurrer, denied that the purchaſe of the eſtate and reſidence thereon as ſtated in the plea, ſuperſeded the ſettlement which *Turner* had previouſly acquired by becoming an inhabitant of and renting the *Queen's Head*, and gave him a new ſettlement in the pariſh in reſpect of ſuch eſtate. But admitting that it did, ſtill he contended that it made no difference as to the defendant's liability, becauſe, according to the expreſs

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expreſs terms of the condition, the defendant was bound to indemnify the pariſh againſt the conſequences of *Turner* and his family becoming inhabitants of and belonging to the pariſh: the language of the condition is preciſe, it is, "notwithſtanding *any* ſettlement *Turner* and his family might gain by becoming inhabitants of the pariſh," and not merely by his becoming the occupier of the particular houſe. But if the defendant's plea be ſuſtainable, then if *Turner* had removed at the expiration of the firſt quarter of a year to another houſe in the pariſh, and reſided in it long enough to gain a ſettlement, the bond would have been ſuſpended. As to the period to which the condition is made to extend, the condition relates as well to children then born as to *any child or children which the wife thereafter might be pregnant with*, ſo that it is clear the intention of the parties was to extend the indemnity to events which might happen after the expiration of the ſeven years. Here the Court interrupted *Marryat*, and called upon the other ſide.

Abbott, contrà, contended that the indemnity was limited to the period of the ſeven years for which the leaſe was granted. The condition of the bond recites the taking the leaſe to be the occaſion of the defendant's entering into the ſecurity, and every thing muſt be conſtrued with reference to that occaſion, and not be extended beyond it. If therefore the pariſh was damnified by conſequences which did not ariſe out of the inhabitancy under that leaſe, but out of an inhabitancy unconnected with it, or which happened after the leaſe expired, in either caſe the defendant would not be liable.

Lord

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EDWARDS *against* BOSSIT.

Lord ELLENBOROUGH C. J. The condition applies in terminis to *Turner*'s becoming an inhabitant of and belonging to the parish, and the consequences which might result from it. One of the consequences was his acquiring a settlement by renting and occupying the *Queen's Head*, and thereby in case of poverty becoming chargeable to the parish. This was what the parish officers intended to secure the parish against at the time when they let the house to *Turner*, and this consequence has happened notwithstanding what the plea alleges of his having subsequently purchased and resided on an estate in the parish, which might have conferred a settlement upon him there if he had not gained one before, but having a continuing settlement there already, he could not gain a second settlement. There is no such thing as a cumulative settlement known in the law.

BAYLEY J. The parish was damnified after the seven years by a settlement acquired during the seven years.

Judgment for the Plaintiffs.

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Doe on the ſeveral demiſes of William and Thomas James, otherwiſe Morgan, *againſt* Hallett.

Deviſe to the uſe of *A.*, *only ſurviving ſon* of *J. S.*, for life, and to his firſt and other ſons, &c., and for default of ſuch iſſue to the uſe of the firſt, ſecond, and of all and every other ſon and ſons of *J. S.* lawfully *to be begotten*, and the heirs male of the body of ſuch firſt and other ſons, with proviſo that the ſaid *A.* and his firſt and other ſons, and alſo the firſt and other ſons *hereafter to be born* of the ſaid *J. S.* ſhould reſide at the family houſe, &c.: Held that the ſecond ſon of *J. S.*, *born before* the date of the will ſhould take upon the death of *A* without iſſue.

IN ejectment brought to recover poſſeſſion of ſeveral meſſuages and lands in the pariſhes of *Kintbury* and *Hungerford*, in the county of *Berks*, tried before *Wood* B. at the laſt *Lent* aſſizes for that county, the plaintiff recovered a verdict ſubject to the opinion of this Court on the following caſe.

John James being ſeized in fee of the premiſes in queſtion by his will duly made and publiſhed, dated the 8th day of *December* 1768, deviſed all his manors, meſſuages, lands, tenements, and hereditaments, and real eſtates in the counties of *Berks* and *Wilts*, unto Sir *John Filmer*, Sir *Thomas Head*, and *William Blackſtone*, Eſquire, and their heirs, to the uſe of his wife *Alice James* for and during the term of her natural life, and from and immediately after her deceaſe, then he deviſed as follows, "to and for the uſe and benefit of *William Head*, *only ſurviving ſon* of the ſaid Sir *Thomas Head*, until ſuch time as he ſhall attain his age of 24 years, (with power to the truſtees to let the premiſes, receive the rents, and lay out the ſurplus for his benefit, over and above what ſhould be deemed ſufficient for his maintenance;) and after he ſhall ſo attain his age of 24 years, then to the uſe of him the ſaid *William Head*, for and during the term of his natural life, and after the determination of that eſtate, to the uſe of the ſaid Sir *John Filmer*, Sir *Thomas Head*, and *William Blackſtone*, and their heirs, for and during the life of the ſaid *William Head*,

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Head, in truſt, to preſerve the contingent remainders hereinafter limited from being defeated, and immediately after the deceaſe of the ſaid *William Head*, to the uſe of the firſt, ſecond, third and of all and every the other ſon and ſons of the body of the ſaid *William Head*, lawfully to be begotten, one after the other, according to their priority of birth, and the heirs male of the body of ſuch firſt and other ſons reſpectively iſſuing, and for default of ſuch iſſue, to the uſe of *the firſt, ſecond, and of all and every other ſon and ſons of the ſaid Sir* Thomas Head, *lawfully to be begotten*, according to priority of birth, *and the heirs male of the body of ſuch firſt and other ſons* reſpectively iſſuing, and for default of ſuch iſſue, to the uſe of him the ſaid Sir *Thomas Head*, for and during the term of his natural life. Then followed ſimilar limitations to the uſe of *James Morgan*, *John Head*, *Richard Head*, *James Head*, and *Charles Head*, reſpectively for life, remainder to the uſe of the truſtees to preſerve contingent remainders, remainder to the uſe of the firſt and ſecond and all and every other ſon and ſons of the ſaid *James Morgan*, *John*, *Richard*, *James* and *Charles Head* reſpectively, lawfully to be begotten in the ſame terms as limited to the ſons of *William Head*, and in default of ſuch iſſue to the uſe of his (the teſtator's) own right heirs. The will then proceeded thus: "Provided always and for preſerving the memory of my family, and continuing my ſaid freehold eſtates in the name of my ſaid family, I do hereby declare my will and intention to be that all and every the perſon and perſons who from and immediately after the deceaſe of my ſaid wife ſhall, by virtue of the limitations hereinbefore contained, be entitled to the immediate eſtate of freehold in my ſaid manors, lands, tenements, and hereditaments,

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ditaments, shall take and use the surname of *James* only, and take and bear the coat armour of my family only, and the better to enable him and them so to do, that he and they shall and do within 14 months after he and they shall become so entitled, petition for and endeavour to procure an act of parliament for that purpose, and if such person who shall be so entitled as aforesaid, shall not petition for and endeavour to procure such an act as aforesaid, then my will is that such person so refusing or neglecting the same shall take no benefit by this my will, but that in such case my said manors, lands, tenements, and hereditaments shall go over to the person who by virtue of the limitations hereinbefore contained shall be entitled to the next immediate remainder in the said premises, and who shall take and use the name and arms of *James* only, and shall and will within 14 months from the time he or they shall become so entitled, petition for and endeavour to procure such an act as aforesaid, as if such person or persons who shall refuse or neglect to petition for and endeavour to procure such act as aforesaid were naturally dead. Provided also, that the said *William Head* and his first and other sons, and also the first and other sons *hereafter to be born* of the said Sir *Thomas Head*, and the heirs male of their respective bodies, shall from and immediately after they shall respectively become entitled to my said manors, lands, tenements, and hereditaments, reside and live at my house at *Denford* aforesaid, and in case he or they shall not reside and live at my said house, then my will is that my said manors, lands, tenements, and hereditaments shall go over to the next person in remainder by virtue of the limitations aforesaid, who will and shall reside and live at my house at *Denford*."

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The teſtator *John James* died in the month of *January* 1769, leaving his widow *Alice*, the ſaid Sir *Thomas Head*, the ſaid *William Head*, *Walter James Head* another ſon of Sir *Thomas Head*, and the ſaid *James Morgan*, him ſurviving.

William Morgan, the father of the ſaid *James*, died about the latter end of the year 1762.

Sir *Thomas Head* had had two other ſons, both of whom died ſome time before the date of the will, and at the date of the will *William Head* was the eldeſt ſurviving ſon of Sir *Thomas Head*, and Sir *Thomas Head* had no ſon born after the date of the will.

Upon the death of the teſtator his widow *Alice* entered upon and enjoyed the eſtates for her life, and upon her death, which happened in *July* 1769, the truſtees under the will entered and took the rents and profits according to the directions of the will, for the uſe of and until the death of *William Head*, the ſon of Sir *Thomas Head*.

William Head took the ſirname of *James* in addition to his own names, and died a batchelor under the age of 24 years in *February* 1777; and upon his death *Walter James Head* entered into poſſeſſion of the eſtates, and took the ſirname of *James*: he is ſtill living, and he and the perſons claiming under him have ever ſince been in poſſeſſion.

Walter James Head was born in the month of *February* 1759, and was perſonally known to the teſtator before the date of the will.

Sir *Thomas Head* died in *October* 1779. The ſaid *James Morgan* died on the 15th of *September* 1810, leaving *William James* otherwiſe *William Morgan*, one of the leſſors of the plaintiff, his eldeſt ſon, and *Thomas James*

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James otherwiſe *Morgan*, the other leſſor of the plaintiff, his ſecond ſon.

The leſſor of the plaintiff, *William James* otherwiſe *Morgan*, was in *America* at the time of his father's death, and had been reſident there for ſome years: he came to *England* on the 28th day of *February* in the year 1811, and he and the other leſſor of the plaintiff within 14 months after the death of their father, aſſumed and have borne the name and arms of *James*; but without obtaining the king's licence for either of thoſe privileges.

On the 13th of *January* 1812, the leſſor of the plaintiff *William James* otherwiſe *Morgan* preſented a petition to the Houſe of Lords, for leave to bring in a bill to authorize him to take and bear the name and arms of *James*, in compliance with the proviſo contained in the ſaid will, and did obtain leave to bring in ſuch bill; and ſuch bill was brought into the houſe on the 22d day of the ſaid month of *January*, and was depending in parliament at the time of the trial of this action.

The caſe then found that the defendant *Hallett* was in poſſeſſion, &c. The queſtion for the opinion of the Court is, whether the plaintiff is entitled to recover. If he is, the verdict is to ſtand: if not, judgment of nonſuit is to be given: but at the trial, liberty was reſerved to either party to turn this caſe into a ſpecial verdict.

Preſton for the leſſors of the plaintiff, contended, that under the limitation "to the firſt, ſecond, and all and every other the ſon and ſons of Sir *T. Head* lawfully to be begotten," *Walter James Head*, the ſecond ſon of Sir *T. H.* at the date of the will, was not entitled to an eſtate tail or any other eſtate. He firſt adverted to the plan of the will,

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will, the main object of which he said was to provide for *William Head*, then a minor, and his male issue, and provision is accordingly made for him during his minority, and for his sons to be begotten, but it does not appear that the testator contemplated any other existing son of Sir *T. H.* at that time. Indeed he has expressly described *William* as the only surviving son, which was certainly not the fact, and the subsequent remainder is confined to the sons of Sir *T. H.* "*to be begotten*," *i. e.* which were not then in being. There is therefore an entire omission in the will of any express mention of *Walter James*, and he is not impliedly comprehended within the subsequent limitation, unless it can be shewn that the words *to be begotten* were intended to be used in the same sense as *begotten*, and farther that the words "*hereafter to be born*," which are the words used in the proviso, include a son *born before*. It is laid down indeed in *Co. Lit.* 20. *b.* that *procreandis* shall extend to the issue born before, for which the 10 *Edw.* 3. 20. is cited in Lord *Hale*'s MS. note upon this passage, who adds however, "but it is held that where the words were *in posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*." That was so decided in 3 *Leon.* 87. Anon., and in *Lomax* v. *Holmden* (*a*) Lord *Hardwicke* adopted that case, for he there said that if the words had been *to be begotten*, they would clearly have described an *after-born* son. There is no authority in which it has been held that in a case where the party is to take by purchase, the words *to be begotten* may be construed the same as *begotten*. *Co. Lit.* and the authorities founded upon it apply only to a case of de-

(*a*) 1 *Ves.* 290.

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ſcent. Here it is probable that the omiſſion aroſe from the circumſtance of this will having been copied from a former will made before the birth of *Walter James*, but it matters not whether it was by miſtake or deſign; if it be ſuch an omiſſion as the Court is not at liberty to ſupply, the leſſors of the plaintiff are entitled to take advantage of it. There is no caſe which has gone the length of ſupplying ſuch an omiſſion. *Chapman* v. *Brown* (*a*) was the caſe of a clear omiſſion, yet the Court refuſed to ſupply it, but conſtrued the deviſe into an eſtate tail in order to effectuate the general intent, but there Lord *Mansfield* expreſsly took the diſtinction, ſaying that a Court of juſtice might conſtrue ſo as to imply an intent not particularly ſpecified, but could not from arbitrary conjecture, though founded on the higheſt degree of probability, add to a will or ſupply an omiſſion. So in *Clements* v. *Paske*, *Hil.* 1784, MS. note of Mr. *Trower*, which was a caſe ſent from the Court of Chancery to this Court. Deviſe to *A.* for life, and after his deceaſe to the firſt and eldeſt ſon of the body of his (the teſtator's) nephew lawfully iſſuing or iſſued, and for default of ſuch iſſue then likewiſe to the ſecond, third, and every other ſon of his nephew ſucceſſively and in remainder one after another as they ſhould be in ſeniority of age, and the ſeveral and reſpective heirs male of the body of every ſuch ſecond, third and every other ſon or ſons, the eldeſt of ſuch ſons and the heirs male of his body being always preferred before the younger. It was decided that the nephew took an eſtate tail by implication, in order to effectuate the general intent, and let in the deſcendants of the firſt ſon. But in this caſe there is

(*a*) 3 *Burr.* 1686.

not any general intent to be collected from the context in favour of *Walter James*; on the contrary, the words *to be begotten* are frequently used for the very purpose of marking the distinction between sons born and to be born; and even if there were any such general intent apparent, it would be impossible to raise an estate tail by implication in Sir *T. H.* (the father,) because a life estate is expressly limited to him in default of his issue. It may be said perhaps, that *Walter James* might have become the first son by the death of his brother *William* in the lifetime of the testator, and in that event have answered the description; but in *Wilkinson* v. *Adam*, MS. case from Chancery, the rule laid down was, that the date of the will and not the death of the testator is the time from which the will speaks.

Holroyd contrà. The limitation to the first and other sons of Sir *T. H.* to be begotten includes *Walter James*, who was the second son in esse at the date of the will. It is a settled rule in the construction not only of wills but also of deeds, matters of record or fine, or matters of pleading, that the words *begotten* and *to be begotten* are words of the same import, unless it appear to be the intention of the parties using them to use them in a sense as contradistinguished from each other. But that intention does not appear on the face of this will, neither do the words in the proviso, according to the cases, carry it farther. The case in 3 *Leon.* 87. from which alone any argument can be drawn in favour of the lessors of the plaintiff, is very distinguishable, because there were other circumstances in that case besides the use of the words *in posterum*, to shew that those words were meant to be restrained to after-born sons, and supposing that case to be

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law it is at most but the dictum of a single judge. As to Lord *Hale's* MS. note, the only part of it which is his, is the reference to the 10 *Edw.* 3. *Pasch.* 20., in which case as well as in 24 *Edw.* 3. *Trin.* 15. it was held upon a question of variance between the writ and fine that *procreatis* and *procreaverit* extended to children *to be begotten.* These words were considered merely as expressing from whom the persons to take were to issue, and not at what time they were to issue. It is said that there is no express mention of *Walter James*, but it is admitted that the omission is owing to a slip of the testator, and even as the will now stands in one event which has been already anticipated in argument, he would have been expressly comprehended, viz. by the death of *William* during the testator's life. It was so decided in *Lomax* v. *Holmden*, where the second son took the estate under the description of first son of the body, and it was there also decided that *begotten* and *to be begotten* mean the same. But it is said that those words have been held the same in the case of descent only, but not in that of purchase; but *Cook* v. *Cook* (*a*) was a case of purchase: and in *Hewet* v. *Ireland* (*b*), which was also a case where the party took by purchase under a deed and fine, the Lord Chancellor held that the words which *shall be begotten* meant *begotten*, for that the settlor could never intend to neglect a daughter who was too young (being ten years old) to have offended him. Here *Walter James* was about nine years of age at the date of the will, so that that observation strongly applies. Then as to the words in the proviso, "*hereafter to be born*," the case of *Hebblethwaite* v. *Cartwright* (*c*) has decided that the word *hereafter* does not necessarily con-

(*a*) 2 *Vern.* 545. (*b*) 1 *P. Wms.* 426. (*c*) *Cas. temp. Talb.* 31.

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fine the ſenſe to *after born*, it carries it no farther than *to be begotten*. Here the words *to be begotten* occur in five or ſix ſeveral limitations of this will, and if their ſenſe is to be reſtrained in one limitation, it muſt be ſo in the reſt, to which ſuch a conſtruction cannot be reaſonably ſuppoſed to apply. The words of this will muſt be conſtrued according to the rules laid down by Lord *Alvanley* C. J. (*a*). 1ſt, That words are always to be taken in their ordinary ſenſe, unleſs the teſtator has manifeſted an intention to put a different ſenſe on them; and, 2dly, that it muſt plainly appear that the teſtator did not mean to give ſuch an eſtate as would paſs under the words uſed, unleſs controlled by ſuch apparent intent. Here there is no plain intention manifeſted to uſe the words *to be begotten* in a different ſenſe from what the law will otherwiſe put upon them. He then ſtated that there had been a deciſion in the Court of Chancery in 1778 by Lord *Bathurſt* C. upon this very will, upon a bill of revivor filed after the death of William Head, &c., on which it was decreed that *Walter James*, (the then plaintiff,) by the death of *William* had become the firſt ſon of Sir *T. H.*, and was entitled under the limitations of the will. He alſo objected to the title of *William James*, (one of the leſſors of the plaintiff,) that his abſence in *America* did not excuſe him from petitioning for an act of parliament within 14 months from his father's death.

Preſton in reply. The laſt objection cannot avail, becauſe there are two demiſes, one from the eldeſt, the other from the ſecond ſon, who is clearly within time. The decree ſtated to have been formerly pronounced in this

(*a*) 3 *Boſ. & Pull.* 627. *Poole* v. *Poole.*

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case was upon consideration of the former will, and other grounds, which the Court cannot now notice. As to *Hebblethwaite* v. *Cartwright*, it is applicable only to a case of descent, and *Cook* v. *Cook* and *Hewet* v. *Ireland*, which it must be admitted were cases of purchase, are founded on a misapplication of the doctrine in *Co. Lit.* to cases not within the meaning of it. In the first of those cases the circumstances are not fully stated in the report; and the last, if it should arise again, would be worth re-considering. In *Counden* v. *Clerk* (*a*) the rule is laid down, that a person who is to take as purchaser must answer every part of the description under which he takes.

Lord ELLENBOROUGH C. J. It would be a matter of the deepest regret if in consequence of the joint effect produced by the blunder of the testator and the neglect of his attorney, we were compelled to put a construction on this will which would defeat the testator's intention, and exclude those whom he meant to make the objects of his bounty. I call it a blunder of the testator, because if he had read over his will with attention before he executed it, he must have perceived that he had misdescribed *William Head* as the only surviving son of Sir *Thomas* at the time when another son *Walter James*, then nine years old, was in being, and as is stated was then personally known to him. It was also a neglect on the part of his attorney in not making inquiries, after such a lapse of time as intervened between the first and second will, whether the state of his family had undergone any alteration. But I disclaim all considerations of this sort in the present instance, and am willing that the conjoint omis-

(*a*) *Hob.* 29.

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ſions of the teſtator and his attorney ſhould have their full legal effect. The will muſt ſtand or fall according to the language of it, but I think that language will not upon a fair conſtruction of it, diſappoint the intention of the teſtator. The firſt miſtake is in the deſcription of *William Head* as the only ſurviving ſon. Now he was not the only ſon, for there was another living of the age of nine years. But how does that miſtake affect or control the ſubſequent limitation? The limitation is to the uſe of the firſt, ſecond, and all and every other ſon and ſons, &c., i. e. who at the death of *W. Head* would become firſt ſon. Therefore *Walter James* is certainly within the comprehenſion of the words; there is only a miſdeſcription of the firſt taker. Then come the words, "lawfully to be begotten," which would give riſe to a material queſtion if it had not been ſettled by a ſeries of authorities, and impeached by none, that "to be begotten" mean the ſame as "begotten," embracing all thoſe whom the parent ſhall have begotten during his life, quos procreaverit. It was ſo conſidered in *Hewet* v. *Ireland*, and it was there ſaid that as procreatis takes in children to be begotten, and procreandis includes children then begotten, ſo the words "which ſhall be begotten," upon which the queſtion turned in that caſe, ſhould relate to the death of the parent, and then the daughter born before the ſettlement ſhould be included under that deſcription. The ſame ſenſe is put upon the words in *Co. Lit.* 20. So in *Cook* v. *Cook*, upon a deviſe to the iſſue of *J. S.*, who had a daughter, and afterwards a ſon, it was held that both ſhould take, and the Lord Keeper ſaid that the words begotten and to be begotten are the ſame, as well upon the conſtruction of wills as ſettlements, and take in all the iſſue after begotten. But it may be ſaid that

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neither in *Hewet* v. *Ireland* nor in *Cook* v. *Cook* are the words "in posterum" to be found, the peculiar force of which was supposed in 3 *Leon.* 87. to control the other words. But what was the case in 3 *Leon.?* There the feoffor made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body in posterum procreandis. The case therefore did not turn entirely upon the effect of the words "in posterum," for the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude that son altogether. I therefore think that what was said by *Wray* J. in that case was right. But in *Hebblethwaite* v. *Cartwright*, where the words were, to the heirs male of the body *hereafter to be begotten*, which are the same as *in posterum procreandis* in 3 *Leon.*, yet Lord *Talbot* held that those words did not confine the limitation to the issue born after, but took in that born before. That decision indeed does not affect to overrule the case from *Leon.*, nor does it appear by the report that that case was cited in argument, and brought under the view of the Court; still it is to be considered as an express decision of that very eminent Judge upon the construction of these words. The case therefore of *Hebblethwaite* v. *Cartwright* dispose of the words *in posterum*. Here the words "hereafter to be born" occur only in the proviso, and I cannot say that "to be born" are to be taken in a different sense from "to be begotten" in the former parts of the will, but the same construction will apply to all, and "hereafter" has been shewn not to restrain their general sense. On the authority, therefore, of all the cases, I think the words "to be begotten" will include then born as well as to be born, and that *Walter James* is comprehended within the terms of this will as having become

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become the firſt ſon of Sir *Thomas* upon the death of *William* without iſſue.

LE BLANC J. The Court cannot proceed in forming their judgment on this caſe upon any reference to the miſtake which has been ſtated as the cauſe of this omiſſion in the will, nor can they rely on the decree of Lord *Bathurſt* when the former will is ſtated to have been made a ſubject of conſideration. The queſtion muſt be decided ſimply on the conſtruction of this will. The teſtator ſets out with ſtating a fact, which is not true as found by the caſe, viz. that *William Head* was the only ſurviving ſon, for there was then another ſon, *Walter James*, and the teſtator knew that circumſtance. Then he gives to *William* an eſtate for life, and after his deceaſe to his firſt and other ſons in tail, and then come the words on which the doubt ariſes, with remainder "*to the uſe of the firſt, ſecond, and all and every other ſon of the ſaid Sir* T. Head *lawfully to be begotten.* It is ſaid that *Walter James*, who was the ſecond ſon in exiſtence at the time when the will was made, cannot take becauſe he does not come under this deſcription. But let us ſee how the caſe would have ſtood if the teſtator had not uſed the words "*to be begotten*," but only "*lawfully begotten.*" In that caſe *Walter James* would not have anſwered the deſcription of firſt ſon, becauſe the teſtator had before given the eſtate to *William* as the eldeſt, but would he not have taken at the death of *William* as being the firſt ſon then begotten? Then looking to the words "to be begotten," what difference do they make? The caſes have already eſtabliſhed that thoſe words will embrace children both then born and to be born, and in the MS. caſe from Chanc. cited by Mr. *Preſton*, it was held that there was no diſtinction

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tion between born and to be born, and that too, in a case of purchase and not of descent (*a*). No doubt circumstances might have existed to shew that the testator meant to exclude begotten children by this description, but there are no such circumstances that I can find. The testator limits the remainder to *William* the eldest son, and afterwards to the first and other sons of Sir *Thomas* to be begotten; and if those words comprehend begotten, they will let in a second son then in esse, for there does not appear any intention to exclude, but only to give the estate to *William* the first son in the first instance, and afterwards, if he died without issue, to the son next in succession. But it is said the words "hereafter to be born," which occur in the last of the two provisoes, indicate an intention to exclude, but as both the provisoes are meant to refer to the same persons, I think the words in the last must be taken not as words of exclusion but merely of description, meaning those persons who according to the words of the former proviso would, by virtue of the limitations of the will, be entitled after the death of the wife to the next immediate estate. There is therefore nothing to manifest an intention on the part of the testator to exclude *Walter James*, and there is no rule of law which imposes upon the words that the testator has used such a construction as will necessarily exclude him.

BAYLEY J. I am of the same opinion. This is purely a question of construction upon the will. We are bound to say, that when this will was made the testator was not aware of any other son than *William*, because he expresses that he is the only son; and where a testator uses the

(*a*) *Wilkinson* v. *Adam*.

words

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words to be begotten, not being aware of any other iſſue, the rule is that thoſe words ſhall include children then born; and if it were not ſo, it would militate in every caſe againſt the intention of a teſtator. The limitation is made to the children in reſpect of the ſtock, and not of perſonal affection to them; but if the words to be begotten were held to exclude children then born, it would exclude a child born a few days before at a diſtant place. That affords a good reaſon therefore for conſidering the words "to be begotten" as of the ſame import as begotten, becauſe otherwiſe great injuſtice might ariſe; and as the word "begotten" does not exclude children after born, ſo neither do "to be begotten" exclude children then born, being merely words to denote the children of the ſtock. But if there are circumſtances to ſhew a plain intention to uſe the words in a more reſtricted ſenſe, they will bear a conſtruction in conformity with ſuch intention; but it is admitted that there is nothing here to ſhew ſuch an intention. It is ſaid that *Walter James* does not come within the deſcription of firſt ſon of Sir *Thomas Head*, becauſe *William* was the firſt ſon; but firſt ſon may mean firſt ſon after *William*, at the time of his death without iſſue, when the remainder was to take effect. I cannot place reliance on the words in the proviſo "hereafter to be born," becauſe when I find that the teſtator was ſo uncertain of the fact as to ſtate that one was the only ſon, who was not the only ſon, ſo I cannot ſay that in uſing the words "hereafter to be born," the teſtator, who was inops conſilii, meant to denote thereby a clear intention to confine his bounty to the excluſion of a ſon then born.

Judgment of nonſuit.

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Friday, Feb. 5th.

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A factor cannot pledge the goods of his principal: therefore, where goods were conſigned from abroad to a factor to be ſold on account of the conſignor, and a bill of lading was ſent to deliver the goods to the factor or his aſſigns, and the factor afterwards indorſed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with inſtructions to do the needful, and the defendants made advances to him on the credit of thoſe and other goods, without knowing that he was not the owner of them: Held that the defendants could not retain the goods againſt the conſignor until payment of the debt due to them from the factor on account of theſe advances.

TROVER for coffee. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings, a ſpecial verdict was found, which ſtated in ſubſtance as follows:

The plaintiff, on the 29th of *March* 1810, ſhipped on board a veſſel then lying in the river of *Demerara*, and bound for *London*, a quantity of coffee, his property, and conſigned the ſame to one *Vos*, then a merchant in *London*, his correſpondent and factor, to be ſold by *Vos* as ſuch factor, for the benefit and on the account of the plaintiff, and took bills of lading from the maſter of the veſſel for the ſaid goods. By the terms of the bills of lading (which were in the uſual form) the coffee was to be delivered in the port of *London* to *Vos or his aſſigns*, he or they paying freight. The plaintiff tranſmitted one of the bills of lading from *Demerara* incloſed in a letter from him to *Vos* in *London*, dated 30th of *March* 1810, directing *Vos*, after ſale of the goods, to place the proceeds to the credit of his private account with *Vos*, which bill of lading and letter were duly received by *Vos*. The ſhip arrived in the port of *London* in *June* following, when the goods were delivered to *Vos* for the aforeſaid purpoſes, who, at the time when he received the bill of lading and goods, was and ſtill is indebted to the plaintiff to a conſiderable amount. On the 16th of *June Vos* indorſed the bill of lading to the order of *W.* and *F. Coles* and *Williams* (the defendants), and afterwards delivered the ſame, together with other bills of lading and the ſaid goods, to the defendants (who are ſworn brokers in the city of *London*), ſending with the bills of lading a letter as follows:

Meſſrs.

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Meſſrs. *W.* and *F. Coles.* *June* 16th, 1810.

My laſt reſpects are of the 13th inſtant, when I handed you 2 bills of lading, and adviſed my draft for £250; I have now 4 bills of lading, viz. (here followed a deſcription of the 4 bills of lading, one of which related to the coffee in queſtion) wherewith you will receive do the needful for my account. (Signed) *H. Vos.*

Vos at the time of ſuch indorſement of the bill of lading and delivery of the goods was indebted to the defendants in about 300*l.*, and the defendants afterwards, on the faith of theſe and other goods put into their hands by *Vos*, advanced to him from time to time various ſums of money, in conſequence of which, at the time of his bankruptcy he was and ſtill is indebted to the defendants in a ſum greatly exceeding the value of the coffee. The defendants, at the time when they received the bill of lading and goods from *Vos*, and advanced money to him thereon, had no knowledge that he was not the owner of the coffee. *Vos* was a general merchant as well as factor, and as ſuch uſually employed the defendants as general brokers in the ſale of *Weſt India* produce. *Vos*, ſoon after the indorſement of the bill of lading, became a bankrupt, the ſaid goods then remaining unſold in the hands of the defendants, whereupon the plaintiff gave notice to the defendants of his claim to the goods as owner, and demanded of them the delivery of the goods; but the defendants refuſed to deliver them without payment of the debt due to them from *Vos*, and before the commencement of this action converted the goods to their own uſe.

Richardſon for the plaintiff ſtated the only queſtion to be whether a factor has authority to pledge the goods of his

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his principal, the pawnee at the time having no knowledge that the factor was not the owner of the goods. He contended that the law had been eſtabliſhed for upwards of half a century that he had no ſuch authority. In *Paterſon* v. *Taſh* (*a*) it was ſo laid down by *Lee* C. J. not as a new principle, but as a well-known rule of law at that time, and although that was only a niſi prius deciſion, it derives authority from all the ſubſequent deciſions on the point. In *Wright* v. *Campbell* (*b*) the general rule was admitted, and the only doubt there was whether it was a caſe of bonâ fide ſale, or only of colluſion between the factor and indorſee of the bill of lading, upon which a new trial was granted; but Lord *Mansfield* C. J. ſaid that until an actual ſale of the goods the principal retains his lien. In *Daubigny* v. *Duval* (*c*) the rule was recognized and acted upon, and that caſe is the more remarkable, becauſe there an exception was attempted to be engrafted on the general rule, viz. that the pawnee might acquire a lien to the extent of what he advanced, provided ſuch advance did not exceed the amount of what the principal owed to his factor: and Lord *Kenyon* C. J. then expreſſed conſiderable doubts upon the queſtion, but he afterwards ſeems to have changed his opinion, as appears by ſeveral caſes referred to by Lord *Ellenborough* C. J. in *M'Combie* v. *Davis* (*d*). The ſame rule is expreſsly ſtated as received law by Lord *Loughborough* C. J. in *Lickbarrow* v. *Maſon* (*e*), and afterwards when Lord Chancellor, in *De Bouchout* v. *Goldſmid* (*f*), and was acted upon by this Court both in *M'Combie* v. *Davies* (*g*), and *Newſom* v. *Thornton* (*h*), in the latter of which it was

(*a*) *Str.* 1178. (*b*) 4 *Burr.* 2046. (*c*) 5 *T. R.* 604.
(*d*) 7 *Eaſt*, 7. (*e*) 1 *H. Bl.* 362. (*f*) 5 *Veſ.* 211.
(*g*) 6 *Eaſt*, 538 7 *Eaſt*, 5. (*h*) 6 *Eaſt*, 17.

held

held that as the property could not be pledged, ſo neither could the bill of lading, which was the ſymbol of the property. Here, as was ſaid by *Lawrence* J. in that caſe, the defendants might have aſcertained the property by enquiring for the letters which accompanied the bill of lading. The caſe of *Pickering* v. *Buſk* (*a*) was a caſe of ſale, and the judgment of the Court proceeded on the ground of the plaintiff having by his own act given authority to his broker to ſell the goods, and therefore does not apply in principle to the preſent; and although Lord *Ellenborough* C. J., alluding in that caſe to *Paterſon* v. *Taſh*, ſaid that it was a hard caſe, he by no means profeſſes to over-rule it, nor was it neceſſary for the purpoſes of that deciſion.

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Walton contrà. The caſe ſtates that *Vos* was a general merchant as well as factor, and as ſuch uſually employed the defendants, and there is this diſtinction between this caſe and *Newſom* v. *Thornton*, that there the bill of lading was to the order of the ſhippers, whereas here it was to *Vos* himſelf, who might therefore on that account, coupled with their knowledge of his dealings as a merchant, reaſonably be miſtaken by the defendants for the owner of the goods; for as to the argument that they might have aſcertained the fact by enquiring for the letters, it is ſufficient to ſay that the practice is unuſual, and would not be tolerated in commercial dealings. It is obvious, on the other hand, that the plaintiff might have prevented all miſtake by ſpecially indorſing the bill of lading to *Vos* as factor. If the principle of *Paterſon* v. *Taſh* be not new, neither is that upon which the caſe

(*a*) 15 *Eaſt*, 38.

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of *Evans* v. *Marlett* (*a*) was decided, viz. that a conſignment of goods by bill of lading to *A.* transfers to *A.* the legal property, although it may be ſubject to truſts, and enables him to ſue for them in his own name; and a diſtinction was there taken between goods conſigned to *A.* generally, and goods conſigned to *A.* for the uſe of *B.*, in which latter caſe it was ſaid that *B.* muſt ſue. In *Lickbarrow* v. *Maſon* (*b*) *Buller* J., contrary indeed to the opinion of ſome of the other judges, held that the indorſement of the bill of lading transferred the legal property, and he cited *Fearon* v. *Bowers* in 1753 as in point, and what Lord *Mansfield* had ſaid in *Wright* v. *Campbell*; and ſuch was the ultimate deciſion of *Lickbarrow* v. *Maſon* upon the venire de novo directed by the Houſe of Lords. [*Bayley* J. That was the caſe of a transfer of the bill of lading by the vendee.] Here as in *Wright* v. *Campbell* the goods were put into the hands of the brokers to ſell, in diſcharge of prior debts; it is not therefore the caſe of a mere pledge like *Newſom* v. *Thornton*. Then as a factor who has authority to ſell the goods, has a lien for his advances upon them, and may retain for ſuch advances; in like manner he may authorize another, to whom as broker he commits the goods for the purpoſes of ſale, and who makes advances upon them, to retain alſo. It is for the intereſt of the conſignor that the broker ſhould have this authority, as it will facilitate the raiſing money to anſwer the bills of the conſignor; otherwiſe the goods muſt frequently be ſold to a diſadvantage, inſtead of waiting for the beſt market. In *Pulteney Bart.* v. *Keymer* (*c*), it was held that the broker might retain for advances made on the credit of goods

(*a*) 1 *Ld. Raym.* 271. 12 *Mod.* 156.
(*b*) *D. P.* 1795. 6 *Eaſt*, 24. *n.*
(*c*) 3 *Eſp. N. P. C.* 182.

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lodged in his hands by the conſignees, againſt the owner of the goods. [Lord *Ellenborough* C. J. There the broker had a lien for the duties; here it does not appear that the defendants had any lien; Lord *Eldon* held that the broker was not bound to take the indemnity of another in lieu of his lien.] In *Haille* v. *Smith* (*a*), a bill of lading was indorſed as a ſecurity for future advances, and *Eyre* C. J., who did not agree with *Buller* J. in *Lickbarrow* v. *Maſon*, yet held that the indorſement of the bill of lading operated as evidence of the change of property, and ſaid that in ninety-nine times in an hundred it would be concluſive.

Richardſon in reply. If the pawnee chooſes to abſtain from making enquiries either from motives of intereſt, or from the practice of his trade; he muſt take the conſequence. It is ſaid that the bill of lading might have been indorſed ſpecially; the ſame argument was urged in *Wright* v. *Campbell*, but it has never been held neceſſary; and ſurely the ſymbol of the property can never tend to miſlead more than the poſſeſſion of the property itſelf. *Evans* v. *Marlett* only decided that where goods were conſigned by bill of lading, ſuch a property was in the conſignee as would maintain trover; but it may be admitted that a factor or conſignee in a variety of caſes may ſue in reſpect of property conſigned to him; ſuch as, in defence of the property if invaded, or for the price of it, if ſold by him; and perhaps he may be conſidered as the proprietor againſt all the world except his principal. As to this being not an ordinary pledge of goods, but a depoſit for the purpoſes of ſale, if the broker had

(*a*) 1 *Boſ. & Pull.* 563.

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not gone beyond that object, the plaintiff would have had no cauſe of complaint; and that was the caſe of *Pulteney* v. *Keymer*.

Lord ELLENBOROUGH C. J. I think that the plaintiff is entitled to recover. The ſhort ſum of the argument is this, that by the terms of the bill of lading (which create the only difficulty in the caſe), the goods were conſigned to *Vos*, and for any thing that appears to the contrary to the uſe of *Vos*; and therefore it might be a queſtion whether *Vos* was not originally intereſted in them; but it is ſo uſual to do this in caſes where the party is only factor, that I cannot rely on this argument. It is the caſe then of a conſignment to *Vos* by bill of lading, without ſpecifying that the conſignment was made to him in reſpect of any particular character he bore. It is indeed much to be regretted that a bill of lading, inſtead of being launched into the world as an inſtrument of equivocal import, ſhould not have deſignated upon the face of it in what character the conſignment is to be made, where it is intended that the conſignee ſhould fill that of factor only. If that had been done in this caſe, it would have obviated all doubt: however, when we get at the ſubſtance of the tranſaction as it now ſtands, it amounts to this, that the parties ſtood only in the relation of principal and factor. But it has been decided ever ſince the caſe of *Paterſon* v. *Taſh*, that a factor cannot pledge. Perhaps it would have been as well if it had been originally decided that where it was equivocal whether a perſon was authorized to act as principal or factor, a *pledge* made by ſuch a perſon free from any circumſtances of fraud was valid. But it is idle now to ſpeculate upon this ſubject, ſince

ſince a long ſeries of caſes has decided that a factor cannot pledge. But it is ſaid that *Evans* v. *Marlett* ſhews that the conſignee of goods may maintain an action for them. What then? So may many perſons who have but a ſpecial property; as a carrier, who is the mere inſtrument of conveyance, and to whom the goods are only ſent for a ſpecial purpoſe; ſo a warehouſe-keeper, who has them for ſafe cuſtody only, and many others who do not pretend to any abſolute property. The deciſion therefore in *Evans* v. *Marlett* does not conclude any thing adverſe to the propoſition in *Paterſon* v. *Taſh*. Where indeed a factor by the aſſent of his principal exhibits himſelf to the world as owner, and by that means obtains credit as owner, the principal will be liable who furniſhed the means; that was ſo decided before me at *Guildhall*, and this Court afterwards refuſed a new trial (*q*). But how does this caſe ſtand; *Vos* was the debtor of the plaintiff; therefore he could have no claim on the goods. He receives the goods as factor, and afterwards puts them into the hands of the defendants *as brokers*, with inſtructions to do the needful. The defendants therefore received the goods in order to ſell them; which makes the only diſtinction between this and the former caſes, viz. that here the poſſeſſion of the defendants was legal in the firſt inſtance. The defendants then having authority to ſell the goods, if they had advanced money for any purpoſes connected with the ſale, and for which brokers in the ordinary courſe of diſpoſing of goods are accuſtomed to advance it, would have had a lien in reſpect of ſuch advance; but no claim of that ſort is preferred by them; but in this

(*q*) *De Leira* v. *Edwards*.

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ſtate of things the poſſeſſion is demanded of them, and they do not ſet up any ſuch lien, but refuſe to deliver the goods without payment of the debt due to them for the whole amount of their advances made to *Vos* not only on the faith of theſe goods in particular, but alſo of other goods. That is an unfounded claim, according to the caſe of *Paterſon* v. *Taſh*, and the other caſes. Under theſe circumſtances I think that the plaintiff is entitled to recover. The caſe might have been different, if the plaintiff ultra the bill of lading had given colour of title to *Vos*, ſo as to have induced the defendants to believe that *Vos* was the proprietor of the goods.

LE BLANC J. Whether it might not originally have better anſwered the purpoſes of commerce to have conſidered a perſon, in the ſituation of *Vos*, having the apparent ſymbol of property, as the true owner in reſpect of that perſon who deals with him under an ignorance of his real character, is a queſtion upon which it is now too late to ſpeculate, ſince it has been eſtabliſhed by a ſeries of deciſions that a factor has no authority to pledge, whether the perſon to whom he pledges has or has not a knowledge of his being factor. Here *Vos* was clearly factor for the plaintiff; and the circumſtance of the goods having been made deliverable by the bill of lading to *Vos* or his aſſigns cannot make any difference; ſince it conveyed to him no farther authority over the goods than the party, who conſigned them, intended to clothe him with. That authority was to ſell, and in that ſituation *Vos* put the goods into the hands of the defendants, as brokers, to ſell, and ſo far he had authority, and if the defendants had acted up to their character of brokers, and ſold the goods, they would have run

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no risk. But when brokers exceed their authority as brokers, and become pawn-brokers, by advancing money on the goods before sale, then they subject themselves to all risks. The goods were legally in the hands of the defendants, under the authority of *Vos*, but when they advanced money upon them to *Vos*, they exceeded the authority which he had, for thereby *Vos* became a pawner of the goods instead of a seller; and consequently the defendants, who cannot have a better title than *Vos*, have no right to retain the goods in respect of these advances; and they do not claim for any other advances made by them in their character of brokers, in order to enable them to sell the goods. It has been said, that it would be for the benefit of the consignors abroad that their factors should have authority to pledge the goods of their principals, because their consignments are frequently accompanied with a bill drawn on the factor for a part of the price of such consignments. If indeed advances were made merely to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief; and that might be considered in furtherance of the authority given by the principal; but if a party make advances to a factor without enquiring for what purpose they are made, he must be contented to rest on the authority with which it shall appear that the factor is clothed. I cannot see any distinction between this case and the series of cases from *Paterson* v. *Tash*, down to *Newsom* v. *Thornton*, in which it has been uniformly held that a broker cannot retain for money advanced to a factor, when the factor has become insolvent. The case of *Pickering* v. *Busk* was considered as a transaction of sale, and not as a pledge; otherwise

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the Court could not have decided it in favour of the defendant.

BAYLEY J. I am of the ſame opinion. A factor has authority to ſell, but not to pledge; and therefore a perſon who takes a pawn of a factor takes it at his peril. If the principal does any thing to induce the perſon to believe the factor really the principal, that would be a different caſe. Caſes may perhaps exiſt, where a principal would be bound by a pledge made by his factor; but ſuppoſing one of thoſe caſes to be where money has been advanced in payment of a bill drawn by the principal for part of the price of the goods, it is not ſo found here, on the contrary the claim is in reſpect of general advances; and if it had been ſo found, I do not ſay that it would have made any difference. It has been ſaid that as a general rule it would be for the benefit of the conſignor, that the factor ſhould have authority to pledge; that I deny; for it would not be for the benefit of the conſignor that a factor ſhould have authority to pledge for his own debt. But it is unneceſſary to diſcuſs that point, as it is quite clear, that unleſs the conſignor abroad gives the factor a ſpecial authority to pledge, he has no ſuch authority himſelf.

Judgment for the Plaintiff.

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The KING *againſt* The Inhabitants of the Townſhip of BRADFORD.

Saturday, Feb. 6th.

In an indenture of apprenticeſhip a covenant by the apprentice to allow his maſter 2*s.* per week, and to have wages and provide for himſelf during the term, does not require the additional ſtamp required by 44 *G.* 3. *c.* 98, upon an indenture where a ſum of money is contracted for with the apprentice.

UPON appeal againſt an order of two juſtices for the removal of *Thomas Holgate*, his wife and children, from the townſhip of *Bradford* to the townſhip of *Thornton*, both ſituate in the Weſt Riding of the county of *York*, the court of quarter ſeſſions diſcharged the order, ſubject to the opinion of this Court upon the following caſe: The pauper, *Thomas Holgate*, being upwards of 22 years of age, by indenture bearing date the 3d of *April* 1805, bound himſelf apprentice to *David Fawcett*, of *Bradford*, for the term of three years and twenty-one weeks, in which indenture was a covenant in the following words, "He the ſaid *Thomas Holgate* doth agree to allow his ſaid maſter two ſhillings per week weekly and every week, and to have (leaving a blank) wages, and provide for himſelf for the aboveſaid term." The pauper duly ſerved his maſter for the above term in *Bradford*, and the two ſhillings a-week agreed to be allowed, were regularly deducted out of the wages, which he conſtanly received during his ſervice. The indenture was upon a 15*s.* ſtamp, and it was objected on the part of the reſpondents, that the 44 *G.* 3. *c.* 98. (*a*) required

(*a*) The 44 *G.* 3. *c.* 98. *ſ.* 2. enacts, that from and after the 10th day of *October* 1804, there ſhall be raiſed, levied, collected and paid in *England* unto his majeſty, his heirs and ſucceſſors, for and in reſpect of the ſeveral inſtruments, articles, matters and things mentioned, enumerated, and deſcribed in the ſchedules marked A and B thereunto annexed, the ſeveral ſums of money and duties as they are reſpectively inſerted, deſcribed, and ſet forth in the column of the ſaid ſchedules marked A and B, intituled *England*. The ſchedule A annexed to the

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quired a ſtamp of 1*l.* 10*s.*, and therefore the indenture was void.

Burrough and *Hullock* in ſupport of the order of ſeſſions, contended that the agreement by the pauper to allow his maſter 2*s.* per week did not require an additional ſtamp, becauſe it did not come under the meaning of the words in the ſchedule, as a ſum or value contracted or agreed for with the apprentice, which words are the ſame as thoſe uſed in the ſtat. 8 *Ann. c.* 9. *ſ.* 32., and relate only to money contracted for by way of premium to the maſter. [Lord *Ellenborough* C. J. interrupted them by obſerving that the maſter of an apprentice is by law entitled to the whole of his earnings, and aſked whether this amounted to any thing more than his remitting a part of them inſtead of taking the whole.]

Scarlett, contrà, admitted that if the Court viewed the caſe in that light it would fall within the authority of *Rex* v. *Wantage* (*a*); but he ſubmitted that this was to be conſidered as an agreement to allow the maſter 2*s.* per week ultra the amount of the apprentice's earnings, which the maſter was ſtill entitled to take, there being no clauſe in the indenture to reſtrain him. The meaning therefore of the agreement, as appears by the contract, was this, that the maſter ſhould allow wages in conſi-

(*a*) 1 *Eaſt*, 601.

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act, contains the following: "indenture of apprenticeſhip, where the ſum or value given, paid, contracted, or agreed for with or in relation to ſuch apprentice, ſhall not exceed 10*l.*,—15*s.*; exceeding 10*l.* and not exceeding 20*l.*,—1*l.* 10*s.*"

deration

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deration of the apprentice providing for himself, deducting out of those wages 2*s*. per week, which was a benefit resulting to the master.

Lord ELLENBOROUGH C. J. If the words of the covenant were transposed, they would run thus, the pauper to have wages and to allow his master 2*s*. per week, and then there would be no doubt of their meaning an allowance out of the wages simply, and what difference does the order in which they now stand make in the sense? It therefore can never be considered as a boon to the master, who, instead of having the labour of his apprentice for nothing, which he was entitled to have, agrees to pay him wages, deducting 2*s*. per week out of them.

LE BLANC J. The master had a right to the whole of the earnings, but allows, by way of wages, such a sum as they are computed at minus 2*s*. per week on account of his providing for himself.

BAYLEY J. concurred.

Order of Sessions confirmed.

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Saturday, Feb. 6th.

The KING *againſt* The Inhabitants of SOUTH BEMFLEET.

Where the pauper having a freehold eſtate in the pariſh of *A.* which he had let for 50*s.* per annum, rented a tenement in the pariſh of *B.* of the value of 8 guineas per annum, and reſided there 40 days: held that he did not gain a ſettlement in B.; as he could not be conſidered as the occupier of the freehold eſtate.

HENRY BREWITT, his wife and family, were removed by order of two juſtices from the pariſh of *Fobbing* to the pariſh of *South Bemfleet*, both in the county of *Eſſex*. The ſeſſions, on appeal, confirmed the order, ſubject to the opinion of this Court on the following caſe.

The pauper *Henry Brewitt* being legally ſettled in *South Bemfleet*, left that pariſh and went to *Fobbing*, where he rented and lived 40 days in a houſe of the value of eight guineas per annum, having previouſly to and at the time of his quitting *South Bemfleet*, and during his reſidence in *Fobbing*, and when the order of removal was made, a freehold eſtate in *South Bemfleet* which he had let at the rent of 2*l.* 10*s.* per annum.

Pooley and *Walford*, who oppoſed the order of ſeſſions, were called upon by the Court, and contended that by coupling the intereſt of the pauper in the freehold with the renting of the leaſehold, he gained a ſettlement in *Fobbing* within the meaning of the ſtat. 13 & 14 *Car.* 2. The words of that ſtatute are "coming to ſettle in any tenement," which means any property that in point of law is a tenement; they are therefore large enough to embrace the freehold as well as leaſehold intereſt of the pauper, which taken together are of the value of 10*l.* a-year. A perſon in the occupation of ſuch a tenement is not likely to be chargeable, and therefore not an object of removal contemplated by the act. According to

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Lord *Hardwicke* in *R.* v. *Sandwich* (*a*), "the ability of the perſon to occupy a farm or tenement of the value of 10*l.* a-year, ſhall exclude the preſumption of his being likely to be chargeable;" and in *R.* v. *Fillongley* (*b*), *Aſhhurſt* J. ſaid, "If a man has ſufficient credit to be truſted with a tenement of 10*l.* a-year, even out of charity, that is ſufficient to anſwer the intent of the ſtatute, becauſe ſuch a perſon is not likely to become chargeable." If that be ſo, it would be ſtrange if a perſon who has an intereſt in a freehold eſtate ſhould be held likely to be chargeable. As to the caſe of *Rex* v. *South Lynn* (*c*), where it was ſaid that the party muſt ſtand in the relation of tenant to the property; that was only in alluſion to the particular circumſtances of that caſe. *Rex* v. *Donnington* (*d*), and *Rex* v. *Culmſtock* (*e*), ſhew that the occupation of a leaſehold may be coupled with the poſſeſſion of a freehold. [Lord *Ellenborough* C. J. Thoſe were all caſes of occupation; but is there any caſe which ſhews that an occupation as tenant may be coupled with an intereſt as landlord?] An actual perſonal occupation of the whole is not neceſſary; a legal occupation as to part is ſufficient, according to *Rex* v. *Llanverras* (*f*), where the pauper had underlet a part of his tenement, and reſided on the remainder only, yet he was held to have gained a ſettlement in reſpect of the whole. In that caſe indeed the tenement was wholly leaſehold; but the ſame rule applies à fortiori where it is partly freehold. [Lord *Ellenborough* C. J. There the whole tenement was in the ſame pariſh.] That was held to be unneceſſary in *Rex* v. *Donnington* and *Rex* v. *Culmſtock*.

(*a*) *Burr.* S. C. 44. (*b*) 1 *T. R.* 460. (*c*) 5 *T. R.* 664.
(*d*) *Bott*, 5th Ed. 121. *Burr.* S. C. 744. (*e*) 6 *T. R.* 730.
(*f*) *Burr.* S. C. 571. *Bott*, 5th Ed. 134.

[Lord

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[Lord *Ellenborough* C. J. But in thoſe caſes there was an actual occupation of the whole.]

Lord ELLENBOROUGH C. J. It is unneceſſary to hear the other ſide. This can never be called an occupation of a freehold intereſt; where there was no occupation in fact, it being leaſed out to another, and without ſome occupation the pauper cannot gain a ſettlement. The caſes have already gone far enough; the mode of reaſoning adopted to-day would go to ſhew that having any intereſt whatſoever was an occupation; and if puſhed a little farther would take in property in the funds.

LE BLANC J. The words of the ſtatute are "come to ſettle in any tenement," which have been ſufficiently departed from already, when it was decided that if a perſon take a tenement of the value of 10*l.* a-year, and underlet a part, he will thereby gain a ſettlement; but the ground of that deciſion was that he had credit to be truſted with 10*l.* a-year. Here, however, the pauper had only credit for a leſs ſum than 10*l.*, viz. 8 guineas a-year. But it is ſaid he had property of his own elſewhere; of that, however, he was not the occupier; but an ingenious argument is raiſed from what fell from the Court in other caſes to ſhew that the principle of thoſe caſes is applicable to this, where he never occupied to the value of 10*l.* a-year, becauſe it is ſaid that he was not likely to be chargeable; but it is ſufficient to ſay that thoſe caſes are not like the preſent, and that there is no caſe which ſeems to have gone the length contended for.

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BAYLEY J. According to the argument, if a perſon having property of his own of 5*l.* a-year value in *Cornwall*, leaſed it out and came to occupy a tenement of 5*l.* a-year in *London*, that would be coming to ſettle on a tenement of 10*l.* a-year, and the party would gain a ſettlement in *London*. Such a conſtruction of the act would be a violent departure from the words of it.

Order of Seſſions confirmed.

Nolan, *Knox*, and *Trollope* were in ſupport of the order.

WILSON and Others *againſt* KYMER, M'TAGGART, and Others.

Monday, *Feb.* 8th.

THE plaintiffs declared as owners of the ſhip *Harmony*, for the freight of a certain quantity of ſugar and rum from *St. Croix* to *London*, and ſtated that the maſter ſigned bills of lading for the ſame deliverable to *Williams* and *Wilſon* or their aſſigns, he or they paying freight for the ſaid goods; that the ſhip arrived on the 1ſt of *July* 1810, of all which the defendants had notice. That the ſaid bills of lading were indorſed by *Williams* and *Wilſon*

Where the conſignees of a *Weſt India* cargo deliverable by bill of lading to them or their aſſigns, he or they paying freight for the ſame, indorſed it to the defendants, their brokers, for advances made by them, and the cargo on its arrival was landed at the *Weſt India* docks in the names of the conſignees, but was entered at the cuſtom-houſe by the defendants in their own names; and afterwards the defendants obtained delivery from the *Weſt India* docks under an order from the conſignees for that purpoſe, and not under the bill of lading: Held that the receipt of the cargo by the defendants under the order of the conſignees was not a ſufficient ground to raiſe an implied aſſumpſit on their part to pay the freight, and the entry at the cuſtom-houſe made no difference; but as it appeared from previous dealings that the defendants had been in the habit of receiving goods in the ſame manner and paying the freight for them, that was conſidered ſufficient to raiſe ſuch an implied promiſe. The lien of the plaintiffs (the ſhip-owners) for freight continued after the landing of the cargo at the *Weſt India* docks, although they did not give notice to the company to retain the cargo until payment of the freight.

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to the defendants, who thereby became the assignees of *Williams* and *Wilson* in that behalf, and owners and proprietors of the said goods; and thereupon in consideration of the premises, and that the plaintiffs as such owners of the ship, at the special instance and request of the defendants, would deliver the said goods from and out of the said ship to the defendants under the said bills of lading, the defendants undertook and promised the plaintiffs to pay them freight for the said goods according to the said bills of lading. That the plaintiffs confiding in the said promise and undertaking, did deliver the said goods out of and from the said ship to the defendants under the said bills of lading; and although the defendants had and received the said goods out of and from the said ship under and by virtue of the said bills of lading, and the freight according to the said bills of lading amounted to 3000*l.*, yet the defendants did not, although requested, pay the said freight, &c. There were several other counts, and amongst them the fourth count was in the common general form, that the defendants on the same day, &c. were indebted to the plaintiffs in 3000*l.* for certain freight due and payable from the defendants to the plaintiffs in respect of certain goods before that time carried on board a certain other ship from *St. Croix* to *London*, and delivered at *London* to the defendants and at their request: and being so indebted the defendants in consideration thereof promised to pay it. There were also the common money counts.

It appeared in evidence before Lord *Ellenborough* C. J. at the trial in *London*, that the ship *Harmony* was let to freight by the plaintiffs to a house at *Liverpool*, now under the firm of *Williams* and *Wilson*, to whom the goods were consigned, and who received the bills of lading

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lading for the ſame, which were in the uſual form to deliver the goods to *Williams* and *Wilſon* or their aſſigns, *he or they paying freight for the ſame.* The defendants were conſiderable brokers in *London*, and being very largely in advance to *Williams* and *Wilſon*, by whom they were employed as brokers, took from them by way of ſecurity the bills of lading, and afterwards made further advances upon them, which bills of lading *Williams* and *Wilſon* indorſed to them *before* the arrival of the *Harmony*, which was reported at the cuſtom-houſe in *London* on the 19th of *June* 1810, after her entrance into the *Weſt India* docks. The entry was made at the cuſtom-houſe by the defendants in their names, and they paid the duties; but under their direction the goods were landed on the quays at the *Weſt India* docks in the names of *Williams* and *Wilſon*, their names being in the manifeſt as conſignees. An application was made for the freight by the ſhip-brokers for the plaintiffs to the defendants as brokers for the conſignees in *Auguſt* 1810, and the defendants referred them to the conſignees at *Liverpool*, to whom the plaintiffs then addreſſed a letter, dated 7th of *September* 1810, demanding 2904*l.* 19*s.* 3*d.* as the amount of the freight. Soon afterwards *Williams* and *Wilſon* became bankrupts, and the plaintiffs proved this as a debt under their commiſſion on the 4th of *May* 1811, and ſtated that their demand aroſe under the charterparty of 3d *October* 1809. On the 3d of *July* 1810, the order of *Williams* and *Wilſon* to the *Weſt India* Dock Company for the delivery of the goods to the defendants was received by the officer at the docks, which order was to the following effect: "To the directors of the *Weſt India* Dock Company. Pleaſe to deliver to Meſſrs. *Kymer* and Co., or their order, the following

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lowing goods conſigned to us (inter alia) the cargo of the *Harmony*." (Signed *Williams* and *Wilſon*.) Under this order the goods were transferred to the defendants, and were afterwards ſold by them in the courſe of *July* and *Auguſt*, and the amount credited by them to *Williams* and *Wilſon*'s account. It was objected that the action would not lie againſt the defendants, but ſhould have been brought againſt *Williams* and *Wilſon*, who were the conſignees, and to whoſe order the goods were delivered to the defendants as their brokers, and that the entry of the goods at the cuſtom-houſe in the defendants' names would not make them liable; and *Roberts* v. *Holt* (*a*), *Artaza* v. *Smallpiece* (*b*), and the caſe of the *Thereſa Benita* (*c*), were cited in ſupport of this objection. There was alſo another objection made, viz. that the plaintiffs had parted with their lien by landing the goods at the *Weſt India* docks, and therefore there was no continuing lien at the time of the delivery to the defendants, the parting with which, where it ſtill continues, may be a good conſideration to raiſe an implied aſſumpſit to pay the freight, againſt the perſon in whoſe favour the lien is relinquiſhed. Lord *Ellenborough* C. J. upon the laſt objection ſtated to the jury that as the goods were removed out of the ſhip and depoſited at the *Weſt India* docks by act of law, he was of opinion it ought not to operate to the prejudice of the plaintiff's lien, which therefore ſtill ſubſiſted; and upon the firſt objection he left the queſtion to the jury, whether the defendants had promiſed to pay the freight in conſideration of the plaintiffs' having waved their lien, which promiſe his Lordſhip was inclined to think might be

(*a*) 2 *Show.* 443. (*b*) 1 *Eſp. N. P. C.* 23.
(*c*) 4 *Rob. Adm. Rep.* 236.

implied

implied from the circumſtances. The jury found a verdict for the plaintiffs. 1813.

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The caſe afterwards came before the Court in laſt *Michaelmas* term, upon a rule niſi which had been obtained in *Eaſter* term for a new trial, when the objections above ſtated were more fully conſidered.

Park, *Marryat*, and *Campbell*, who ſhewed cauſe, contended againſt the laſt objection, that the 45 *G.* 3. *c.* 58. *ſ.* 15. (local act), relating to the *London* docks, which was in pari materia with the 39 *G.* 3. *c.* 69. (the *Weſt India* dock act,) had expreſsly reſerved the ſame lien for freight in favour of the owners of ſhips out of which goods ſhould be landed, as they were ſubject to whilſt on board the ſhip, and that even without ſuch expreſs reſervation, the goods having been landed in compliance with the requiſitions of an act of parliament, the lien would have been preſerved, according to what was ſaid by Lord *Kenyon* C. J. in *Ward* v. *Felton* (*a*). The *Weſt India* docks therefore are for this purpoſe to be conſidered in all reſpects as the ſhip, and the perſons who firſt take the goods from thence, as the perſons into whoſe hands they firſt come by delivery from the ſhip. On the ſecond point they contended, that juſtice required that the defendants, who had conſented to become indorſees of the bill of lading from *Williams* and *Wilſon*, and had derived all the benefit from the delivery of the cargo, ſhould be liable to the payment of the freight. With reſpect to *Artaza* v. *Smallpiece*, and the caſe of the *Thereſa Bonita*, they were over-ruled by *Cock* v. *Taylor* (*b*), which is an authority to ſhew that the defendants are liable

(*a*) 1 *Eaſt*, 512. (*b*) 13 *Eaſt*, 399.

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in this case. [*Bayley* J. There the delivery to the defendants was under the bill of lading; here it is under the order of *Williams* and *Wilson*.] That makes no real difference; for the defendants by consenting originally to accept the goods under the bill of lading, became liable for the freight, and cannot divest themselves of that liability by obtaining a subsequent order under which they received the goods. The case of *Roberts* v. *Holt* has no bearing upon this: it only decides that the consignee is liable for the freight on receipt of the goods, which does not appear to have been decided before that time. In *Ward* v. *Felton* the bills of lading were not indorsed to the defendant, and the master knew that he acted only as agent for the consignee, in making the entry at the custom-house; therefore, he was clearly not liable for the freight.

The Solicitor-General and *Puller*, contrà, contended that the 39 *G.* 3. *c.* 69. *s.* 87., which imposes the necessity of landing the cargo at the *West India* docks, is totally silent with respect to the continuance of the lien; and supposing that the 45 *G.* 3. *c.* 58. *s.* 15. applied to this case, still it would not help the plaintiffs' claim, as it related only to a particular case recited in it, viz. where the duties are not paid, and where the goods are landed by the officer, in which case the company is authorized, upon notice given to them by the master or owner, to detain the goods until the freight is paid; but here the plaintiffs have given no notice. The plaintiffs might have secured the freight either by entering the goods at the *West India* docks in their own names, or giving notice to the dock company to retain. [Lord *Ellenborough* C. J. The clause is general as to the continuance

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of the lien, and it would be too narrow a conſtruction to confine it to the particular caſe where notice is given, which is only to aid the party in enforcing ſuch lien; but independently of that clauſe, I ſhould hold that if goods are taken out of the hands of the party by operation of law, he ſhall not be prejudiced by it, but the law will retain his lien for him. Is not this point incontrovertible, that when goods on board a ſhip are ſubject to lien, if they are taken out of the ſhip in invitum and by compulſion of law, that the lien ſhall be preſerved in the place of ſafe cuſtody where the goods are depoſited by law? It ſeems a principle of univerſal juſtice, and there was no occaſion for the act to provide for it. *Le Blanc* J. The operation of the clauſe which has been alluded to is to place goods landed under the regulations of that act in the ſame ſituation as if on board the ſhip. The 39 *G.* 3. *c.* 69. *ſ.* 87. & 98. require *Weſt India* ſhips to land their cargoes at the docks under the penalty of forfeiture, which is a landing by compulſion of law.]

On the ſecond point, they contended that *Cock* v. *Taylor* was mainly diſtinguiſhable from this, becauſe in that caſe there was a taking of the goods by the defendant under the bill of lading, and that was held to be evidence againſt him of an agreement to pay the freight due on the goods, which by the bill of lading were deliverable only to the conſignees or their aſſigns, upon payment of the freight. But here the receipt of the goods was under the order of *Williams* and *Wilſon*, and cannot be evidence againſt the defendants, who received them under that order only, and not under the bill of lading, that they had agreed to receive them under the terms of the bill of lading. If it could be, then if theſe goods

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had been ſold through ſeveral hands whilſt remaining in the *Weſt India* docks, the purchaſer who received them from the docks would be liable for the freight, although he had given a full price for them, under an ignorance that the freight had not been paid, which would be a moſt inconvenient rule of commerce. As to the caſe of *Lodergreen* v. *Flight*, cited in *Cock* v. *Taylor* (*a*) it only decided that the contract for freight being entire, the captain had a lien for the whole freight on the remainder of the cargo, after a part delivery of it, but there it appeared that the defendant who was held liable, had received the goods under the bill of lading. The making the entry at the cuſtom-houſe in the names of the defendants, according to *Ward* v. *Felton* will not make them liable. [Lord *Ellenborough* C. J. That was certainly done alio intuitu.]

Lord ELLENBOROUGH C. J. There is certainly one circumſtance in this caſe which forms a material diſtinction between this and the caſe of *Cock* v. *Taylor*, and which ſeems to influence the judgment of my brethren, and therefore I ſhould wiſh the caſe to go to a new trial, in order to enquire into the fact on which that diſtinction is founded, and then, if it ſhould be deemed neceſſary, to conſider farther of that diſtinction. The circumſtance is this, that in *Cock* v. *Taylor* the goods were delivered under the bill of lading only; here they were delivered to the defendants, who were entitled to have them under the bill of lading, and might have enforced their delivery under it, and from whom they might have been withheld until the freight was ſatisfied: but it is ſaid they obtained poſſeſſion of them under an order

(*a*) 13 *Eaſt*, 403.

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for delivery from the conſignees, which imports that the conſignees ſtill continued the proprietors, and not under the bill of lading, although they were indorſees of the bill of lading at the time. Then the queſtion is, can the law extend the lien as againſt perſons who do not claim in that character under which they would be liable for freight, viz. as indorſees of the bill of lading, but as the agents of the conſignees, ſo as to make the parting with the lien to them a ground of conſideration for an implied aſſumpſit by them to pay the freight? That would be carrying the law one ſtep farther than was done in *Cock* v. *Taylor*, and in a caſe of lien we ſhould be anxious to tread cautiouſly and on ſure grounds before we extend it beyond the limits of decided caſes. It ſtruck me at the trial that the defendants, being indorſees of the bill of lading, if they took the benefit derived under it, not having renounced their claim as ſuch indorſees, muſt be conſidered as taking under it, and chargeable according to the terms of that inſtrument, which was eſſential to their title and which gave them the means of enforcing the delivery; but what weighs with the Court is this, that they obtained the goods not by the ſtrength of their title as indorſees, but as agents or ſervants of the conſignees. The Court therefore think it right that it ſhould go down again in order to ſee if that fact can be varied.

GROSE J. There is a very material difference between this caſe and *Cock* v. *Taylor*. This appears to me to be a new caſe.

LE BLANC J. It would be carrying the authority of *Cock* v. *Taylor* further than was intended or foreſeen at

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the time when that caſe was decided, to hold that it governed the preſent. It is eaſy to raiſe an implied aſſumpſit where the parties are cognizant of the terms on which they are dealing, as where the dealing is between the owner or captain and the defendants, but it is not ſo eaſy where the dealing, as in this caſe, is between the owners and a third party, viz. *Williams* and *Wilſon*, for I conceive that here the owners muſt be taken to have delivered the goods on the faith of *Williams* and *Wilſon*.

BAYLEY J. I think *Cock* v. *Taylor* was rightly decided. In that caſe the defendant received the goods as a purchaſer of the bill of lading, making that his title to them, and virtually conſenting that his name ſhould be pledged to the owner for the freight; but here it ſeems to me the defendants never did conſent to that, but ſtanding in a ſituation in which the owners might have had their names pledged if they had claimed under the bill of lading, they adopted the alternative in which their names were not to be pledged to the owners. Inſtead of going with the bill of lading they go with the order of *Williams* and *Wilſon*, and obtain a delivery under it, in their names, as the perſons who were to be pledged, and to whom the captain would conſent to look for the freight. It ſtrikes me, therefore, that *Williams* and *Wilſon* are the only perſons to whom the captain has a right to look: and that appears to be an eſſential diſtinction between the two caſes.

The Court thereupon made the rule abſolute for a new trial, and the cauſe went down again and was tried before Lord *Ellenborough* C. J. at the *London* ſittings in this term, when the ſame evidence was given as before, with this

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this additional proof, that the defendants had upon former occaſions obtained the delivery of other goods under ſimilar orders from *Williams* and *Wilſon*, on which occaſions they had always paid the freight. Lord *Ellenborough* C. J. then told the jury that the privity of contract under a bill of lading ſubſiſted between the ſhipper of the goods and the captain; that the captain and his owners had a lien for the freight of ſuch goods, not only whilſt they remained on board the ſhip, but alſo in the *Weſt India* docks; that ſuch lien might be waved, or the goods might be delivered upon an underſtanding that the freight ſhould be paid, in the ſame manner as if the goods had been retained for the lien; and that ſuch an underſtanding might form a good conſideration for a promiſe to pay the freight, which promiſe might be implied from the circumſtances: that it was for the jury to conſider whether from the former habit of dealing and the uſage of trade they would imply ſuch promiſe. The jury, as upon the former trial, found a verdict for the plaintiffs.

The Solicitor-General on this day moved for a new trial, inſiſting as before that as the defendants had obtained the goods under the order of *Williams* and *Wilſon*, and not under the bill of lading, no privity could be inferred between the plaintiffs and defendants to raiſe an implied aſſumpſit between them; and that as the Court had decided that the authority of *Cock* v. *Taylor* did not ſupport the former verdict, ſo neither did it the preſent.

Lord ELLENBOROUGH C. J. If there were any point of law on which I entertained a doubt, I ſhould be deſirous of having the caſe reconſidered, but I am not aware that there was any point of law which could have

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been presented to the jury otherwise than it was. Then the question is, taking what has been the dealing between these parties and the general usage of trade, whether the defendants, who received these goods, must not be taken to have received them under the same terms that they had always adopted in other cases, viz. under the same liability to pay the freight as the original consignees were under. I left it to the jury to consider whether from the evidence given of the general habit of dealing between the parties, these goods were delivered on an implied understanding that the same course was to be pursued with respect to them.

LE BLANC J. This is not moved upon any question whether the law was properly stated to the jury, nor is it a question now, whether a person merely taking goods under an order for delivery, without any previous dealings of the same sort, would be liable for the freight; for the Court intimated on a former occasion that he would not, and therefore sent the case down to a new trial to ascertain whether on account of any previous dealings between the parties, there was any understanding between them that the defendants should be liable for the freight. It now appears that the defendants uniformly paid the freight for the goods which they received on former occasions. Then the question is, whether the defendants, who appeared to act in the same character upon this as upon former occasions, and did not communicate that they were acting in a different character until after they received the goods, were not to be understood as receiving them upon the same footing as before, *i. e.* upon an understanding that they would pay the freight. That was left to the jury, and they have found that there

there were such previous dealings, and from thence have implied the undertaking. There is no question of law to be considered; but the case, if sent down again, must be decided upon the same facts as now appear. 1813.

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BAYLEY J. The verdict is certainly according to the justice of the case. The defendants were in the habit of receiving goods and paying the freight for them, and when they received the goods in question, knew that the freight had not been satisfied. They could not have meant then in this particular instance to turn the owners of the ship round upon *Williams* and *Wilson*, but must be understood as having agreed to pay the freight as upon former occasions, when the captain was used to send round to them for it; and they cannot be prejudiced by this, because they have got the goods.

Rule refused.

HILHOUSE and Others *against* DAVIS.

Monday, Feb. 8th.

DEBT. The second count of the declaration on which the question arose, stated that on the first of *September*, 50 *G.* 3., at the assizes at *Bristol*, held before *Wood* B., a jury qualified, &c. was sworn and impannelled, &c. according to the act of the 43 *G.* 3. *c.* 140. (*a*) (local and personal) for improving and rendering more commodious the port and harbour of *Bristol*, and to the act of the 48 *G.* 3. *c.* 11. (*b*), for completing the improvement

In an action of debt to recover a sum awarded to the plaintiffs by a jury under the 43 *G.* 3. *c.* 140., and 48 *G.* 3. *c.* 11., as a compensation to be made by the *Bristol* Dock Company for an injury done to the plaintiff's property by means of the works authorized by those acts: Held that the jury might give interest for the detention of the sum awarded.

(*a*) Sect. 44. 107, 8. and 154. (*b*) Sect. 28, 9.

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provement of the port of *Briſtol*, to aſſeſs and award the ſum of money to be paid, and compenſation to be made by the ſaid *Briſtol* Dock Company to the plaintiffs, for an injury ſuſtained by them as occupiers of and perſons intereſted in certain property known by the name of the Lime-kiln Dock, together with other property adjoining the ſame, in that part of the pariſh of *Cliſton* which is in the county of the city of *Briſtol*, by means of the works and improvements authorized to be made by the ſeveral acts of parliament made for improving the port of *Briſtol*, as claimed by a certain memorial of the plaintiffs, preſented to the ſaid Company in that behalf: and that the ſaid jury ſo ſworn, &c. awarded the ſum of 4238*l.* to be the ſum to be paid and compenſation to be made by the ſaid Company to the plaintiffs for the ſaid injury, &c. by reaſon of the ſaid dock and premiſes having been injured and rendered uſeleſs by means of the ſaid works and improvements: and thereupon the ſaid Sir *G. Wood* did give judgment for the ſaid 4238*l.* ſo awarded, &c.: and it was conſidered by the ſaid Judge of aſſize that the plaintiffs ſhould recover againſt the ſaid *Briſtol* Dock Company the ſaid ſum of 4238*l.*, and that the ſaid ſum ſhould be paid by the ſaid Company as and for the amount of the compenſation aforeſaid. The declaration then averred a demand and non-payment of the ſaid ſum of 4238*l.*, to the plaintiffs' damage of 500*l.* Plea, nil debet.

At the trial before *Chambre* J., at the laſt aſſizes for *Briſtol*, the record ſtated in the declaration was produced from the quarter ſeſſions, and the learned Judge's ſignature thereto was proved; and it was alſo proved that the plaintiffs had demanded payment of the ſum aſſeſſed from the defendant, who was treaſurer of the Dock Company,

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pany, which was refuſed, and a reſolution of the Company was paſſed, ſtating that they could not fix on any definitive time to pay the money. The learned Judge directed the jury that they might give damages for the detention of the debt, and that the natural criterion of thoſe damages was the intereſt on the ſum awarded by the jury. Whereupon the jury found a verdict for the debt and damages, which included intereſt on the ſum awarded.

In *Michaelmas* term a rule niſi was obtained by *Lens* Serjt. for reducing the verdict to a ſum excluſive of the intereſt, on the ground that the jury were not authorized to give intereſt, but only nominal damages.

Pell Serjt., *Burrough*, and *Abbott*, now ſhewed cauſe, and contended that the aſſeſſment made under the act of parliament was equivalent to a judgment. The firſt act relating to theſe docks gave juriſdiction to the ſeſſions, who were directed to enter the judgment: then came this act, which gives the ſame juriſdiction to a judge of aſſize. Here the judge has accordingly pronounced judgment, and that judgment is concluſive. The jury therefore were at liberty to give intereſt in an action brought upon it, in the ſame manner as it has been held they may do in actions brought upon regular judgments, *Entwiſtle* v. *Shepherd* (*a*), *M'Clure* v. *Dunkin* (*b*); in which latter caſe the intereſt given exceeded the penalty of the bond; and therefore could not have been recovered in the original action. And according to *Blackmore* v. *Flemyng* (*c*), even on a writ of inquiry, the jury may allow intereſt upon the judgment. [*Le Blanc* J.

(*a*) 2 *T. R.* 78. (*b*) 1 *Eaſt*, 436. (*c*) 7 *T. R.* 446.

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The difficulty is, that this is not a judgment of any Court; what ſort of judgment then can it be called? A judge of aſſize cannot, as ſuch, pronounce a judgment. Lord *Ellenborough* C. J. The act is very defective; but it ſeems only to be an aſcertainment of damages under the authority of a judge of aſſize]. Suppoſing this aſſeſſment not to amount to a judgment, it at leaſt became a liquidated debt from the time of its aſcertainment, and by the rule of the common law it is within the general province of a jury to give damages for the detention of a debt. Then if they were competent to give ſuch damages, there can be no doubt of the propriety of giving them; for the act has expreſſed that they ſhall give a juſt and liberal compenſation, which cannot be done without allowing intereſt for the money withheld. Beſides, the aſſeſſment, although in the form only of damages for an injury, is in ſubſtance an equivalent for property of which the plaintiffs have been deprived by the Company; it is therefore like a caſe of ſale, in which it is clear that intereſt would be due for the time that the purchaſe-money is withheld. If intereſt be not recoverable, it will be allowing a premium to the Company for withholding the money.

Lens Serjt. and *Caſberd*, contrà. There was no evidence of the Company's having withheld payment through any fraudulent or contumacious motives; but their funds are defective. This aſſeſſment is compared to a debt or ſale, but nullum ſimile eſt idem; and ſo it may be like both, without amounting to either, being in fact only a ſpecial concluſion of what compenſation is due to the individual by way of damages for property taken from him for the public benefit. Then it is likened

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to a judgment, to which the ſame anſwer may be given; neither if it reſembled a judgment, is it a matter of courſe to allow intereſt upon all judgments; it is diſcretionary with Courts of Error, and in ſome caſes they have diſallowed it. In *Blackmore* v. *Flemyng* it does not appear from the report whether the original cauſe of action was ſuch as to bear intereſt. (*Abbott* ſaid it was a tailor's bill.) *M'Clure* v. *Dunkin* was on bond, and *Entwiſtle* v. *Shepherd* appears to have been an action which originally bore intereſt. *Hunter* v. *Bowes*, MS. caſe from *C. P.* about two terms ago, was an action of aſſumpſit upon a foreign judgment; the defendant ſuffered judgment by default, and the jury, upon the writ of inquiry, gave intereſt; and the Court held that the jury had no authority to give intereſt, and reduced the verdict to that extent. With reſpect to this being a liquidated debt, it does not therefore follow that it will bear intereſt. In *Hogan* v. *Page* (*a*) it was held that intereſt ought not to be given on a ſingle bond. So it is not allowable on money lent, *Calton* v. *Bragge* (*b*). It is not therefore enough to prove a ſum of money due, unleſs it be due upon ſuch grounds as will entitle the party to intereſt. That has not been ſhewn here; for as to the enactment reſpecting a liberal compenſation, that is directory only to the compenſation-jury, who muſt be preſumed to have given a liberal compenſation, attending to the probability of its not being paid for ſome time.

Lord ELLENBOROUGH C. J. This is a caſe perfectly new and anomalous in reſpect of any other proceedings. It is accompanied with this hardſhip to the plaintiffs,

(*a*) 1 *B. & P.* 337. (*b*) 15 *Eaſt*, 223.

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that unleſs they can recover damages in this action for the detention of their debt they will be without remedy; for by a ſtrange omiſſion in the act, there being no power given to this or any other Court to award execution, the plaintiffs may wait ad Græcas calendas before they will be entitled to their remedy. Under theſe circumſtances the plaintiffs here will be in a much worſe ſituation than the plaintiffs in the caſe cited from the Common Pleas of the action on a foreign judgment, where they ſtill had the means of levying by execution on that judgment; whereas here, if there be no mode of obtaining the judgment of this Court for the damages, they can have no execution; and the only way by which the Company can be deterred from withholding payment is by allowing intereſt in the ſhape of damages, or by an application to the legiſlature for that purpoſe. In this anomalous courſe of proceeding, and upon untrodden ground, I am almoſt afraid of adopting any thing which may ſeem like a general rule; but it does appear to me that it will be in furtherance of juſtice, and the object of the legiſlature, to allow the plaintiffs the benefit of the intereſt aſſeſſed by way of damages in this action. We cannot indeed call it properly a judgment, it being rather a ſtatutable aſcertainment of damages; but with ſome doubt, and for myſelf I confeſs conſiderable doubt in ſo pronouncing, we think that we ſhall be beſt ſuſtaining the juſtice of the caſe by allowing the plaintiffs the amount of the intereſt aſſeſſed.

LE BLANC J. The jury having given intereſt, we cannot ſet their verdict aſide without being ſatisfied that they have done what they were not warranted to do by law. But there is no poſitive rule of law againſt their giving

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giving intereſt on a ſum aſcertained. The rule of law is affirmative that where a ſum is aſcertained, and judgment afterwards pronounced thereon in a court of record, if an action of debt be brought on that judgment, the jury may give intereſt by way of damages for the detention of the debt. The only queſtion is, whether this may be aſſimilated to the caſe of an action on a judgment; and I think it fairly may. This was a ſtatutable proviſion to relieve the Company from actions for damages to be done by them in the execution of the act. Now if in this inſtance an action had been brought, the plaintiffs would have recovered damages to the extent of the injury, and had judgment for thoſe damages; but the legiſlature has appointed another courſe of proceeding, by aſſeſſment of damages before a Judge of aſſize, who is afterwards to give judgment as a ſanction to the finding of the jury. It is an aſſeſſment in invitum, and the party in whoſe favour it is made has no mode of recovering it but by action of debt, and proceeding to judgment in a court of record upon that aſſeſſment; and then he may go on as in other caſes. From the time of the aſcertainment by the jury and the ſanction of the Judge, it ſeems marked out as a ſtage of the proceeding correſponding with that of a judgment recovered in an action; and therefore, by analogy to that, it ſhould ſeem that the ſum aſcertained will bear intereſt.

BAYLEY J. I cannot ſay the jury have done wrong; on the contrary, I think they were right. It is an aſſeſſment of damages before a Judge of aſſize, who afterwards gives judgment upon it, and that comes as near to what is properly a judgment as poſſible. Then the act ſays, the jury ſhall give a juſt and liberal compenſation;

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tion; and the jury aſcertained the ſum of 4238*l.* to be a liberal compenſation to be paid in 1810. The queſtion therefore is, whether two years afterwards a jury were not warranted in concluding that the party is damnified by having been kept out of his compenſation for ſo long a time: I think they were. But it is ſaid this was no fault of the defendant: neither is this a proceeding againſt him as for a penalty, but only for the damages which the plaintiffs have ſuſtained by reaſon of the delay of payment; and although that delay may have ariſen from inability, the damage to the plaintiffs by the detention is the ſame. Then it ſeems that the intereſt upon the ſum withheld is a reaſonable meaſure of compenſation.

Rule diſcharged.

Monday, Feb. 8th.

RUMSEY, Aſſignee of Collins, a Bankrupt, *againſt* GEORGE and Another.

Huſband alone cannot be the petitioning creditor to ſupport a commiſſion of bankruptcy, in reſpect of a debt compoſed partly of a ſum of money due to him in his own right, and partly of a ſum due to his wife dum ſola.

TROVER for goods the property of the bankrupt before and at the time of his bankruptcy, which the defendants had taken in execution ſubſequent to the act of bankruptcy. At the trial before *Chambre* J. at the laſt aſſizes at *Briſtol*, the trading was admitted, and the other circumſtances neceſſary to conſtitute a bankruptcy were fully proved, ſubject only to a queſtion that aroſe upon the validity of the commiſſion in reſpect to the petitioning creditor's debt. It appeared by the learned Judge's report, that the commiſſion was obtained upon the petition of the plaintiff *Rumſey*; whoſe demands upon the bankrupt, as it was proved, aroſe in the following manner.

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RUMSEY against GROSE.

In *July* 1804 the bankrupt borrowed of *Mary Spencer*, widow, who afterwards and before the act of bankruptcy became the wife of *Daniel Rumsey*, (the plaintiff,) the sum of 90*l.*, for which he was to pay her interest by quarterly payments. This interest was often applied for, but never paid except once. After Mrs. *Spencer* married the plaintiff, application was again made for payment, and an answer received from the bankrupt that he could not then discharge it, but would as soon as he was able. As the act of bankruptcy was not committed until about *May* or *June* 1809, the debt of 90*l.* with the interest most probably exceeded 100*l.*; but it was also proved that a farther debt was contracted with the plaintiff himself, by a promissory note from the bankrupt, dated 11th *February* 1809, for 25*l.* 4*s.*, and payable to the plaintiff or order, with interest from the date. The affidavit of debt was made by *Rumsey*, and stated that the bankrupt was indebted to the deponent in the sum of 150*l.* for money lent by the deponent and his wife previously to her marriage, and for interest due thereon. Upon this part of the case it was objected by the defendant's counsel, that the debt of 90*l.* and interest remained a debt due to the wife: that the husband could not have sued for it without joining his wife in the action, and that the right would survive to the wife upon her husband's death before the debt was recovered, and therefore it was not a debt to the husband to entitle him alone to become the petitioner for a commission of bankruptcy: and they cited the case *Ex parte Staples* (*a*), where the debt was due to the wife as administratrix. The question was reserved for the decision of the Court; and after the

(*a*) 7 *Vin. Abr.* 67. *pl.* 10.

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other parts of the case had been proved, the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for 118*l.* damages. Accordingly *Lens* Serjt. having in *Michaelmas* term obtained a rule nisi for that purpose,

Pell Serjt. and *W. E. Taunton* shewed cause, and admitted that they were not able to find any case precisely in point, but contended that the principle of those cases applied in which it had been decided that the wife must be joined with the husband in all actions for debts due to her dum sola; and for this they referred to *Fenner* v. *Plaskett* (*a*), 1 *Roll. Abr.* (*b*), *Garforth* v. *Bradley* (*c*), *Bull. N. P.* (*d*), *Milner* v. *Milnes* (*e*). So where a debt is due to the wife as administratrix, the husband alone cannot make oath of this being a debt due to himself in order to found a commission of bankruptcy, *Ex parte Staples* (*f*): for which purpose also it is necessary that the debt should be a legal debt, *Ex parte Hillyard* (*g*), *Medlicott's case* (*h*). Here the legal debt was not due to the husband alone, but to the husband and wife in right of the wife; and if the husband had died, leaving the wife, it would have survived to her, *Garforth* v. *Bradley*. They referred also to 2 *Vern.* 707., Anonym., and *Co. Lit.* 351. *b.*, as authorities to shew that choses in action belonging to the wife do not vest in the husband, unless reduced by him into possession during the coverture.

Lens Serjt. and *Richardson* contrà. The only case in point for the defendant is the case *Ex parte Staples*, which

(*a*) *Moor.* 422. (*b*) *P.* 347. *R. pl.* 3. (*c*) 2 *Vef.* 676, 7.
(*d*) *P.* 179. (*e*) 3 *T. R.* 631. (*f*) 7 *Vin. Abr.* 67. *pl.* 20.
(*g*) 2 *Vef.* 407. (*h*) *Str.* 899.

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turned upon the diſtinction of the debt being due to the wife as adminiſtratrix. [*Le Blanc* J. referred to the caſe of *Maſter* v. *Winter* (*a*), cited in *Davies*.] There alſo the wife was executrix, and the ſame diſtinction was taken, that as the debt was due to her in autre droit, ſhe ought to have joined with her huſband in ſuing out the commiſſion: and the reaſon given in *Ex parte Staples*, that the huſband alone could not make oath of this as a debt due to himſelf was true, for he could never have applied it to his own uſe. But here the huſband claims a debt due to the wife proprio jure, and may apply it to his own uſe, and therefore he is competent to make affidavit that it is his debt, and ſo the reaſoning of that caſe does not apply. The wife could not have been the petitioning creditor; for the ſame ſtatute which requires the oath requires alſo the petitioner to give a bond (*b*), which a feme covert is not competent to give. It is true indeed that, generally ſpeaking, the huſband muſt join his wife in actions upon debts due to the wife; but that is not ſo always; and in *Brett* v. *Cumberland* (*c*) it is laid down by *Dodderidge* J. as a rule to be obſerved, that the huſband may well have an action in his own name without his wife for the recovery of that which he may diſcharge alone, and of which he may make diſpoſition to his own uſe. Beſides here it appears that there was a forbearance by the huſband after the coverture; and in the caſe of a feme covert executrix, it was held that the huſband alone may maintain an action on a promiſe in conſideration of forbearance (*d*). A fortiori then he may

(*a*) 2 *Montag. Bankt. Caſes*, 129.
(*b*) 5 *G.* 2. *c.* 30. *ſ.* 23.
(*c*) 3 *Bulſt.* 164.
(*d*) 1 *Salk.* 117., and *Carth.* 462.

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do ſo, where the debt is due to himſelf, as in the preſent caſe.

Lord ELLENBOROUGH C. J. A conſideration of forbearance by the huſband is a conſideration ariſing during coverture, and expreſsly moving from the huſband, who has the power of immediately enforcing the claim, and is therefore ſufficient to ſupport a promiſe made to him alone, who is the inſtrument of forbearance. But that queſtion does not ariſe: the queſtion here is whether, in the caſe of a debt belonging to the wife antecedently to coverture, the huſband can treat it as his own debt, when the law does not conſider it as his own abſolutely, but only potentially ſo, *i. e.* provided he reduce it into poſſeſſion during the coverture. It is quite clear that this debt would have ſurvived to the wife. Then we are to conſider what deſcription of debt is neceſſary to ſupport a commiſſion of bankruptcy. The caſes ſay that it muſt be a legal debt. Is this ſo? Is the ſum of money which was due to the huſband and wife legally the debt of the huſband; and can he, under a ſtatute which requires him to make affidavit of the truth and reality of his debt, ſwear that this is his debt? I think he cannot. The reaſon aſſigned in the caſe of the executrix, of its being a debt due to her in autre droit, certainly does not much advance the argument in this; and therefore I do not form my opinion on that caſe: but I take a diſtinct ground, viz. that this was not the debt of the huſband, but of the wife. With reſpect to debts due to the wife, the huſband is her irrevocable attorney, if I may ſo ſay; and if he reduce them into poſſeſſion during the coverture, they become his debt; but until

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that is done, they remain the debt of the wife, and all the cases agree that in the event of his death, they would survive to her. As to the other sum of money which was clearly due to the husband, the two debts cannot amalgamate and unite together, so as to form one debt of the husband. That being so, I think that the husband alone could not make affidavit of this being his debt, because that by reducing it into possession he might have made it his.

LE BLANC J. I think the nonsuit was right. Two cases have been cited, where although the character of the parties was different, yet the principle applies. One of these cases was determined in a court of equity, the other in a court of law, where the same objection was insisted upon as in this case. As to the argument that the wife could not join as petitioning creditor because she could not give a bond; that would have held equally where the wife was executrix or administratrix, for there the husband only could enter into the bond. I do not see therefore that that circumstance will prevent the husband and wife from being petitioning creditors; and if the debt must be a legal debt in order to support a commission, this cannot be considered as the debt of the husband, until he has reduced it into possession.

BAYLEY J. concurred.

Rule absolute.

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Tuesday, Feb. 9th.

SLAUGHTER *against* CHEYNE and BRYANT.

A deed of composition embracing *all the creditors*, under which many of them came in, is in case of a subsequent commission of bankruptcy, such a "compounding with his creditors," as will within the stat. 5 *G.* 2. *c.* 30. *s.* 9. deprive the bankrupt of the benefit of his certificate to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition.

THE defendant *Bryant* in 1806 entered into a deed of composition with his creditors for payment of a composition of 10*s.* in the pound as far as his effects would extend, and under that deed, which embraced in its terms *all the creditors*, many of them came in, but some refused, and sued him and were paid. On the 16th of *November* 1811 a commission of bankruptcy issued against him, under which he obtained his certificate on the 23d of *April* 1812. The plaintiff's execution in this action, which was for a cause of action arising prior to the commission of bankruptcy, was executed on the 8th of *December* 1812, upon goods obtained by *Bryant* after his certificate. Under these circumstances *Bryant* obtained a Judge's summons for staying proceedings on the fi. fa. as to the goods obtained after his certificate, which was opposed on the ground that he had compounded *with all his creditors*, and the learned Judge declined making any order thereon.

Lawes now moved to set aside the execution levied on the defendant *Bryant*'s goods, and to restore to him 150*l.* 3*s.* paid thereon into the hands of the sheriff of *Middlesex*, upon an affidavit disclosing the above circumstances. He contended that the certificate obtained by the defendant under his commission was a discharge of his future effects from liability, and that according to the case of *Norton* v. *Shakespeare* (*a*), the prior composition

(*a*) 15 *East*, 619.

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with his creditors would not defeat the effect of that certificate, becauſe as all the creditors did not come in under it, it had but a partial effect, and never completely diſcharged the defendant from his debts.

But Lord ELLENBOROUGH C. J. ſaid that there was a clear diſtinction between this caſe and *Norton* v. *Shakeſpeare*, where the compoſition was limited to one particular deſcription of creditors only, and did not extend to creditors of every deſcription. Here the defendant as far as in him lies, has compounded with all his creditors of whatever deſcription, for he has propounded a general and equal ſatisfaction to them all, and therefore it is complete as to them. The caſe cited refers to this very diſtinction.

Per Curiam, Rule refuſed.

The KING *againſt* THOMAS WILDEY.

Tueſday, Feb. 9th.

Plea of autrefoit acquit, which does not ſtate the record of acquittal, is bad. On writ of error brought on a judgment of conviction for felony at the quarter ſeſſions, this Court will only look to the record of conviction, although the juſtices return alſo the record of a former acquittal.

THE defendant was indicted at the quarter ſeſſions for the county of *Somerſet*, for a larceny, in the uſual form. To which indictment he pleaded as follows, "that at this ſame general quarter ſeſſions of the peace of our ſaid lord the king now holden at the time and place aforeſaid, before the aforeſaid juſtices of our ſaid lord the king, he the ſaid *Thomas* was in due manner of law acquitted of and from the very ſame identical felony and offence in the ſaid indictment mentioned, as by the record of the ſaid acquittal in the ſaid court here will fully appear; and this he is ready to verify, wherefore he prays judgment, and that he may be diſmiſſed and

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diſcharged of and from the premiſes in the ſaid indictment mentioned," &c. To this plea there was the following replication, viz. "that there is no ſuch record in the ſaid court here of the ſaid acquittal in due manner of law of the ſaid *Thomas* of and from the very ſame identical felony and offence in the ſaid indictment mentioned as by the ſaid *Thomas* is in his ſaid plea in that behalf above alledged." Demurrer and joinder; upon which the juſtices gave judgment of reſpondeas ouſter, and thereupon the defendant pleaded not guilty, and at the ſame ſeſſions a verdict of guilty was found, and judgment of tranſportation for 7 years awarded againſt him. Afterwards in *Michaelmas* term laſt the defendant brought a writ of error on this judgment, to which the juſtices returned as well the record of acquittal of the defendant as the record of conviction above ſtated, and the defendant aſſigned the following errors, "that the replication was argumentative in this, to wit, that it denied the exiſtence of the record of acquittal of the ſame felony and offence mentioned in the indictment, but did not alledge that there was any other felony or offence ever committed or charged or ſuppoſed to have been committed by the ſaid *Thomas* than that mentioned in the indictment, and to which the ſaid acquittal related; and alſo, in as much as the replication was double and multifarious, and required ſeveral different trials (that is to ſay) by the record as to the exiſtence of the record, by the Court as to the legality of the acquittal, and by the country as to the identity of the offence mentioned in the replication; and alſo in as much as there was no concluſion to the replication, as there ought to be, pointing out the mode of trial by giving a day for the inſpection and production of the ſaid record, or averring the matters contained in

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in the replication, or praying that the ſame might be enquired of by the country; and laſtly, that by the record and proceedings aforeſaid, it appeared that the ſaid *Thomas Wildey* was compelled to anſwer over, and had been convicted of the premiſes mentioned in the indictment, whereas by the law of the land the ſaid *Thomas Wildey* ought to have been diſmiſſed and diſcharged of and from the premiſes mentioned in the indictment."

This caſe came on upon a former day in this term, when *E. Lawes* for the defendant below, adverting to the return made by the juſtices, endeavoured to ſhew that by coupling the two records together it was apparent that the defendant had already been acquitted of the ſame offence of which he was afterwards convicted, and although this was not ſpecially aſſigned as error, yet the Court would take notice of it under the general aſſignment that the defendant ought to have been diſcharged from the ſaid indictment. In *Biſhop*'s caſe (*a*) there was a variance between the writ and declaration, and after error brought, the writ was removed by certiorari into this court, and the judgment was reverſed, although the variance was not aſſigned for error. [*Bayley* J. There the Court referred only to the record in that ſuit.] In Sir *John Heydon*'s caſe (*b*) a record is cited in which the judgment was reverſed for errors not aſſigned. [The Court here interpoſed, ſaying that they could look only to that return which was made according to the exigency of the writ, and that the record of acquittal formed no part of ſuch return.] He then inſiſted upon the ſeveral

(*a*) 5 *Rep.* 37, *b.* (*b*) 11 *Rep.* 8, *a.*

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errors assigned, and principally that the replication was bad for duplicity, putting in issue the whole plea which, according to 2 *Hale's P. C.* 240., consisted partly of matter of record, and partly of matter of fact; 2dly, that the replication did not contain any conclusion referring either to the Court or the country, nor prayer of judgment which were essential; and upon these points he cited *Pendred* v. *Chambers* (*a*), *Pitt* v. *Knight* (*b*), and *Rex* v. *Shakespeare* (*c*).

Abbott contrà, answered to these objections, that although there was more prolixity in the replication than usual, yet taking it with reference to the defendant's plea, it amounted to a plea of nul tiel record, it pursued the allegation in the plea, and denied the existence of any such record; and he referred to *Sanford* v. *Rogers* (*d*), to shew that it was not necessary there should be a formal conclusion, or that a day should be given for producing the record. He then contended that the plea was bad, being informal, and not agreeable to the usual form of pleading, nor according to the rules prescribed by Lord *Hale*, as necessary to be observed in such plea. It is laid down by Lord *Hale* (*e*), that the plea of autrefois acquit is a special plea, and that the prisoner must plead the record in certain, and not expect until nul tiel record be pleaded, for it is part of the prisoner's plea, and the means are also stated whereby he may possess himself of the record. Conformably to these rules a form of pleading is given in *Vidian* (*f*), and in *Vaux's* case (*g*),

(*a*) *Cro. Eliz.* 256.
(*b*) 1 *Lev.* 222. 1 *Saund.* 97.
(*c*) 10 *East*, 83.
(*d*) 2 *Wils.* 113.
(*e*) 2 *Hale's P. C. ch.* 31.
(*f*) *Vidian's Entries*, 207.
(*g*) 4 *Rep.* 44.

where

where the reaſon is apparent for requiring the record to be ſet out. The only precedent in ſupport of the preſent form is one in *Raſtal* (*a*), which appears to be rather a ſhort note of the proceedings than an accurate ſtatement of what is required in ſuch plea, for it does not even vouch the record.

E. Lawes in reply. Admitting the precedent in *Raſtal* to be defective, yet that defect has been ſupplied here by the addition of "prout patet per recordum," and if this plea contains every thing eſſential, it is no objection that it is conciſe. In civil proceedings it is always uſual to plead a judgment recovered without ſetting it out. [Lord *Ellenborough* C. J. A taliter proceſſum eſt may be generally good in civil and yet not in criminal caſes, where it is the eſtabliſhed mode of pleading to ſet out the whole record for the reaſons given in *Vaux*'s caſe. Is there any authority for ſuch a conciſe form of pleading in criminal caſes?] The proſecutor might have craved oyer. Lord *Hale* ſays (*b*), if a record be pleaded in bar in the ſame court, the other party ſhall have oyer of the record. Here the defendant has vouched the record, and therefore the proſecutor might have craved oyer and demurred if the record was defective. The precedent in *Raſtal* is copied into *Burn's Juſtice*, and has been uſed as a common form of pleading. *Staundford* (*c*) ſays it is a good plea to an indictment for felony to ſay that he was at another time arraigned before ſuch juſtices, &c. and acquitted, and to vouch the record; and ſuch plea ſhall be a good bar.

(*a*) *Raſtal's Entries*, 385., Ed. 1670, under tit. Gaol Delivery, *pl.* 4.
(*b*) 2 *Hale's P. C.* 241. (*c*) *Staundf. P. C.* 105.

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The Court took time to consider, and on this day judgment was delivered by

Lord ELLENBOROUGH C. J. Since this case was argued I have looked attentively into *Rastal*; and I find the precedent there stated is as full of faults as it can be. Indeed I can hardly conceive any thing more faulty; it is even worse than the plea that has been the subject of our consideration; which however is perfectly vicious for want of setting out the record, to shew that the prisoner was legitimo modo acquietatus, which appears to be necessary from the reasons given for the judgment in *Vaux*'s case. In that case *Vaux* was indicted for poisoning one *Ridley*, and in discharge of that indictment he pleaded a plea of autrefois acquit, and set forth the former indictment and record in certain; and because the indictment was insufficient, and therefore the life of the party was never in jeopardy, for this reason he was held not legitimo modo acquietatus, and so the plea not a bar to a second indictment for the same offence. After this decision reported by Lord *Coke*, adopted and referred to by Lord *Hale*, who states pregnant reasons for its adoption (*a*), can we say that this is a good plea, in which there is no indictment set out, nor is it pleaded that the defendant was acquitted by verdict, nor that he had judgment quod eat sine die, which Lord *Hale* says is necessary to be pleaded (*b*), and upon the face of which it does not appear but that the defendant was pardoned? The precedent in *Rastal* is therefore one of the most vicious precedents that I ever contemplated; it merely states that prædictus *W.* ad barram

(*a*) 2 *Hale's P. C.* 248. (*b*) *Ib.* 243.

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ductus et allocutus qualiter ſe velit de felonia prædicta acquietare, dicit quod ipſe alias ſcilicet, &c. acquietatus fuit, unde petit judicium, &c. It does not even conclude with a voucher of the record, as the precedents uniformly require, and Lord *Hale* deems to be eſſential (*a*); but the concluſion is quia teſtatum eſt per præfatos Juſt^s. quod præd. *W.* acquietatus fuit, which might have been by verdict ſtill ſubſiſting in parol. I cannot conceive how ſuch a form of pleading could ever have been conſidered as fit to be adopted. And yet this precedent is ſet againſt the precedents in *Vidian*, in *Vaux*'s and *Vandercomb*'s caſe (*b*), all of which I have examined. I had alſo a curioſity to know on what authority the precedents in *Raſtal* were founded; and upon looking at his preface I find the author is anxious to diſcharge himſelf from all reſponſibility reſpecting that part of his work. He ſays, "Underſtand this, good reader, that none of the declarations, pleadings, entries, and precedents that be in Latin in this book be of my making or compiling." He then points at the ſources from whence they were derived, viz. four books: firſt, the old entries; the ſecond, a book of precedents by Mr. Edward Stubbis; the third, precedents by John Lucas; the fourth, a book of precedents, which, he ſays, "was my grandfather's, Sir John Moore, ſome time one of the juſtices of the King's Bench, but not of his collection." The only merit which he takes to himſelf, which is undoubtedly not an inconſiderable one, is in the arrangement of them and the index; but he expreſsly diſcharges himſelf from every other reſponſibility; aſſigning as a reaſon for ſo doing,

(*a*) 2 *Hale's P. C.* 242. (*b*) 2 *Leach's Crown Caſ.* 823.

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in the concluding part of his preface, that he had been abſent from the kingdom, "and lacking conference with learned men." This may be conſidered as a ſufficient excuſe for many errors; and, among others, for the inſertion of that vicious precedent, on the ſole authority of which we are deſired to overturn the numerous authorities laid down by Lord *Coke* and Lord *Hale*, two of the moſt eminent authors and judges that have ever adorned *Weſtminſter-hall*. It is unneceſſary to ſay any thing upon the defects of the replication, becauſe the queſtion is taken up at an earlier ſtage of the proceeding, viz. the plea, and upon that we are of opinion, without farther reference to the abundant authorities which may be found collected in Lord *Hale*, that the plea is bad; and conſequently that the judgment of the Court below muſt be

Affirmed.

Tueſday, Feb. 9th.

The KING *againſt* The Juſtices of CUMBERLAND.

Where the weavers preſented a petition to the juſtices at ſeſſions, praying them to limit a rate of wages according to the proviſions of ſtat. 5 *Eliz. c.* 4. *ſ.* 15., and 1 *Jac.* 1. *c.* 6. *ſ.* 3., and the juſtices heard the petition and counſel in ſupport of it, and after making inquiry and examining witneſſes upon the ſubject, determined that they could not make any rate more beneficial to the weavers: this Court refuſed a mandamus to the juſtices to hear and determine, although they did not examine the witneſſes tendered by the petitioners, nor any witneſſes upon oath, or in open court.

A Rule was obtained in *Trinity* term, which was afterwards enlarged in the laſt until this preſent term, for a mandamus to the juſtices of *Cumberland*, "commanding them, together with the ſheriff of the ſame county, if conveniently he may, purſuant to the ſtatute in ſuch caſe made and provided, to hear and determine, upon the application of certain weavers of the ſaid

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county, for them the ſaid keepers of the peace and juſtices to limit, rate, and appoint the wages of weavers in the ſaid county." The affidavits on which the rule was granted ſtated that at the general quarter ſeſſions in *April* laſt, within ſix weeks of the feaſt of *Eaſter*, a petition was preſented by the deponents and others, "operative weavers of *Carliſle* and its vicinity," diſcloſing the reduced ſtate of their wages, and their total inadequacy to procure for them and their families the common neceſſaries of life, and praying the juſtices to grant them relief by putting in force the acts of parliament relative to the rating of mechanics' wages according to the rate of proviſions, viz. the 5 *Eliz. c.* 4. *ſ.* 15. and the 1 *Jac.* 1. *c.* 6. *ſ.* 3., and affixing ſuch prices to the different fabrics of cotton cloth as would enable the workers thereof to live by their labour. That evidence was offered to the juſtices in ſupport of the allegations contained in the ſaid petition, but that without hearing ſuch evidence, or making any inquiry, or calling unto them ſuch grave and diſcreet perſons as by law is required, the juſtices wholly refuſed to grant the prayer of the ſaid petition, and to conſider of fixing a rate of wages, and to hear what might be alleged thereon, or proceed in the matter as by law they ought to do, and that no rate of wages of the weavers within the county has been made at any time before or ſince the ſaid ſeſſions. The rule was oppoſed by an affidavit of the chairman and ſeveral of the juſtices who attended at thoſe ſeſſions, which ſtated that the petition upon being preſented was attended to by them, and counſel heard in ſupport of it on the ſame day, and that they took further time until the next day to conſider of the ſubject, and after making every inquiry in their power into the relative ſituation of maſters

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and weavers, and sending for and examining all or the most part of the principal manufacturers in the city of *Carlisle*, as to the wages allowed to weavers, and the profits arising to themselves, and comparing the present wages of the weavers and profits of the manufacturers with the wages and profits of former years, and after maturely and attentively considering the subject to the best of their judgment and ability, they were of opinion that they could not in justice make any rate of wages which would be more beneficial, or more than the wages then allowed to the weavers, and therefore made no order upon the said petition.

Park and *Scarlett*, who now shewed cause against the rule, admitted that the Court had granted a similar rule in favour of the journeymen millers in *Rex* v. *The Justices of Kent* (*a*), but denied that it was under similar circumstances with the present. In that case the justices refused to entertain the subject of the petition under a supposition that they had no jurisdiction to hear it; and this Court in granting the rule only decided that the stat. 1 *Jac.* 1. *c.* 6. was a continuing law: still the question remains whether the powers given to the justices by that statute are to be called into action at the instance of individuals, or are left to be exercised at their own discretion. The act requires that they shall assemble themselves together, and then gives them authority to limit such wages as they shall think meet by their discretion to be rated: it is clear therefore that it meant to leave the discretion entirely with the justices, whether or not to put their powers into motion. But 2dly, supposing

(*a*) 15 *East*, 395.

they

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they may be compelled upon the prayer of others, here it appears that the juſtices acted upon the petition; for they heard it, and fully inquired into the ſubject, and decided that they could not make any rate more beneficial to the weavers than the then exiſting rate of wages. They have therefore done every thing which the petitioners required, unleſs indeed it is to be contended that they are bound to make a rate without exerciſing any diſcretion at all, which can hardly be contended either upon the words or the intention of the act.

Topping and *Brougham* contrà. If the juſtices are required by ſtatute to do an act, this Court in the exerciſe of its juriſdiction will ſee that they do it properly, and will enforce the doing it by mandamus; and for that purpoſe, even if it ſhould appear to be the true conſtruction of the ſtatute that the juſtices are to act of themſelves in the firſt inſtance and not upon the petition of others, will ſtrike out that part of the rule which requires them to proceed *on the application of the weavers* rather than permit the ſtatute to remain a dead letter. But there is no occaſion for that; becauſe it is an acknowledged rule of conſtruction, that where a ſtatute gives a remedy, it alſo gives a means of attaining that remedy, and although the party on whoſe behalf it is given be not named in the ſtatute, yet he may enforce it. Therefore in *Rex* v. *The Juſtices of Weſtmorland* (*a*), a mandamus was granted to appoint overſeers for a hamlet, upon an affidavit that there were poor belonging to it; and yet the 13 & 14 *Car.* 2. *c.* 12. does not empower any individual to enforce the appointment; and in *Rex*

(*a*) 1 *Wilſ.* 138.

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v. *The Juſtices of Kent* the mandamus was granted in the ſame form as now prayed. As to the objection that the juſtices have heard and decided upon this application, it is ſtated that they would not hear the evidence offered in ſupport of the petition; and although they ſtate, on the other hand, that they examined all the principal manufacturers, yet thoſe were intereſted witneſſes, and it does not appear that even theſe witneſſes were examined upon oath, or in the preſence of the parties making the application. Beſides, the 5 *Eliz. c.* 4. *ſ.* 15, 16. is imperative upon the juſtices either to make a new rate, or to continue the old one, notwithſtanding the equivocal expreſſions "ſhall aſſemble themſelves," and "ſhall have authority," uſed in the former part of *ſ.* 15. Here the juſtices have done neither.

Lord ELLENBOROUGH C. J. We are now occupied in the conſideration of a rule to ſhew cauſe, which is in theſe terms, viz., why a mandamus ſhould not iſſue to the juſtices of *Cumberland*, commanding them, in purſuance of the ſtatute, to hear and determine upon the application of certain weavers, and to limit, rate, and appoint the wages of weavers in that county? Such is the deſcription of this application. Two objections have been made to it; the 1ſt, that we have no authority in this inſtance, to direct them to hear and determine, which is contrary to what we decided in *The King* v. *The Juſtices of Kent*, whether rightly or not I will not now pauſe to enquire, but will aſſume that we did right, and that in this reſpect the application ought to be entertained. But there is another objection of more weight, viz., that the juſtices have heard and determined. The ſtreſs of the argument on the other ſide is this, that they

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are bound to hear and determine according to a judicial courſe of proceeding, by the examination of witneſſes upon oath, and in a public court. Now, on that ſubject we muſt refer to the ſtatute, and if we find that however clearly it impoſes the duty, it leaves the mode of exerciſing that duty at large, and to be purſued according to the diſcretion of the juſtices, we cannot impoſe on them the terms on which they are to exerciſe it, or the forms of proceeding which may be neceſſary in other caſes. Now, the ſtatute ſays, that "the juſtices ſhall aſſemble themſelves together, and calling unto them ſuch diſcreet perſons as they ſhall think meet," ſo far it is clearly directory, "and conferring together reſpecting the plenty or ſcarcity of the time and other circumſtances neceſſarily to be conſidered," without ſaying examining ſuch perſons upon oath, "ſhall have authority," &c. That is the whole which the act preſcribes as to the mode in which the juſtices are to exerciſe their function. Whether that function is to be called forth by the application of others, or to be exerciſed on their own motion, or whether it is diſcretionary in them to make a rate or not to make it, are queſtions not now before the Court; becauſe this is not an application calling on them merely to determine, but to hear and determine in a certain way, and the anſwer is that they have heard and determined in that way. If they have determined wrong on that occaſion, ſtill if they have heard and determined, we ſhould not grant the application in this form, which would be to hear again. I do not mean to ſay that if they are to hear and determine, the Court will not enforce it; and therefore if their hearing was eluſory, I agree that, on the authority of *The King* v. *The Juſtices of Kent*, (ſubject only to any reviſion which that caſe

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may undergo) that a mandamus ought to be granted. But what does the affidavit ſtate upon this part of the caſe? They did hear the petition, and they alſo heard counſel in ſupport of it; which is more than I ſhould have expected them to do; for in a matter which was not of judicial inquiry, it was not neceſſary, and would of courſe lead to ſubjects of declamation and perhaps inflammation, and I ſhould therefore have diſſuaded them from it. But they not only heard, they inquired alſo into the relative ſituation of the maſters and weavers, and into the preſent rate of wages allowed to weavers, and profits ariſing to the manufacturers as compared with thoſe of former years. What am I to infer from all this, but that they took into conſideration the ſtate of their wages, in reſpect to their inadequacy to procure for them the neceſſaries of life according to the rate of proviſions. It is ſaid they inquired of perſons concerned in the trade and intereſted; but that is incident to all inquiries of this nature, where thoſe who are concerned are the perſons beſt able to give the neceſſary information. I will not entertain ſo harſh a preſumption, as to ſuppoſe that the principal manufacturers would be inclined to deny to their fellow-labourers, what was a fair allowance under the exiſting circumſtances. But beſides hearing and inquiring, the juſtices determined alſo; for they were of opinion that they could not make any more beneficial rate. I admit that that will not ſatisfy the act, if they are bound to make a rate; but that is not the queſtion ariſing upon this application; neither do I pronounce any opinion upon it, but deſire to be underſtood as deciding only on this application, which is to compel the juſtices to *hear* and determine. The inquiry to be made by them is not a judicial inquiry; if it were ſo, every

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weaver might come to the ſeſſions with his counſel and witneſſes, and require to be heard in open court; but the act has left it very general, and not required the application to be proceeded on according to judicial forms. Then if the juſtices have duly heard, it would be actum agere to compel them to hear again.

LE BLANC J. This is an application for a rule to ſet in motion powers given to the juſtices, the exerciſe of which, according to the general ſenſe of mankind in modern times, it may be fairly ſaid would be moſt injurious to both maſters and workmen; however proper they might have been at the time when the act paſſed. But notwithſtanding this, the Court will enforce thoſe powers if they ſee that the juſtices have refuſed to do that which the act preſcribes. The rule calls on them upon the application of certain weavers to hear and determine: not to make a rate. The queſtion is, have they heard and determined on ſuch application: if they have, the Court will not grant a mandamus directing them to do that which they have done already. It is objected that they have not heard and determined in the ſame manner as upon appeal touching a ſettlement or on indictment found; but I cannot ſay that any thing in the act ſhews that the powers of the juſtices muſt be exerciſed in the ſame way as if they were proceeding between litigating parties, viz. upon the oath of witneſſes and in open court. But they were deſired by the petitioners to conſider of the inadequacy of their wages, to hear evidence thereon, and to determine on the fixing a rate of wages more adequate: and they did ſo, and have returned to us that after making inquiries into the ſtate of the trade and the wages allowed to weavers, they were of opinion they could not

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in justice make any rate more beneficial to the weavers. To be sure if they were bound at all events to fix a rate of wages, such a return would be insufficient. The act however says they shall have authority, and therefore perhaps if the state of the trade would not permit a higher rate, it would be a ground for their not fixing one; but that is not the question now before us. The act requires that they shall assemble themselves together and call to them such discreet persons as they shall think meet, and confer together; and they have stated to us upon oath that they have so done. I therefore think the rule ought to be discharged.

BAYLEY J. I think the justices have heard and determined as far as they were obliged within the meaning of the act. There is nothing in it to compel them to hear and determine openly; and with respect to fixing a rate, although it is not necessary to go into that question, I cannot but think that the fair construction of the act is to give them a discretion on that subject, to fix a rate or not according as in their judgment it shall seem expedient. That appears to have been the impression of the Court in *Rex* v. *The Justices of Kent*. The act uses compulsory words where it directs the justices to assemble themselves together, for it says, "*shall* assemble themselves," &c.; but when it directs them to limit the wages, it only says, "shall have *authority* to limit," &c., which is a marked difference in the terms used by the legislature.

Rule discharged.

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HOLT *againſt* FRANK and Another (*a*).

Wedneſday, Feb. 10th.

If in a joint action againſt two the recognizance of bail be drawn up by miſtake in an action againſt one only, and the plaintiff after two writs of ſci. fa. againſt the bail, and nihil returned to them, ſign judgment againſt the bail and take out execution; the Court will ſet aſide the judgment and execution for irregularity.

THE plaintiff brought a joint action againſt *Stephenſon* and *Burn*; and the two defendants in the preſent action became bail above, for *Stephenſon* alone, the recognizance of bail being drawn up by miſtake in a cauſe of "*Stephenſon* at the ſuit of *Holt*," inſtead of "*Stephenſon*, ſued jointly with *Burn*, at the ſuit of *Holt*." The plaintiff obtained judgment in the original action, and after having fixed the bail, ſued out two writs of ſci. fa. againſt the defendants as bail of *Stephenſon*, and having procured each ſci. fa. to be returned nihil, ſigned judgment againſt them and took out execution. Under theſe circumſtances,

Tindal obtained a rule niſi for ſetting aſide this judgment and the execution, upon the ground that if the defendants had been ſerved with the ſci. fa. they might have appeared, and pleaded nul tiel record as a bar to the action; and that wherever they are prevented from pleading by the plaintiff's procuring two nihils to be returned, they may avail themſelves of their defence either on an auditâ querelâ, *Sampſon* v. *Collingwood* (*b*), or the Court will relieve them by motion, *Ludlow* v. *Lennard* (*c*). 2dly, That the defendants were really injured by the form in which the recognizance was drawn up, as they had loſt the means of rendering *Stephenſon*, there being no ſuch action as that of *Stephenſon* at the ſuit of *Holt*.

(*a*) We were favoured with this note by Mr. *Tindal*.
(*b*) 1 *Salk.* 261. (*c*) 2 *Ld. Raym.* 1295.

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And 3dly, that it was the plaintiff's duty to have ſeen that the recognizance was properly drawn up, as the plaintiff's attorney charges a fee for ſearching the book at the Judge's chambers to ſee if the bail-piece has been duly entered, which fee he is allowed in coſts.

Littledale now ſhewed cauſe, and contended that the drawing up the recognizance was not the act of the plaintiff in the action, but of the defendant, or the bail, and therefore the plaintiff ought not to be prejudiced by the defective mode of drawing it up. And he produced an affidavit, by which it appeared that the plaintiff had ſued out a joint writ againſt both the defendants in the original action, but that *Stephenſon* had been arreſted in the county palatine of *Durham* under proceſs of the Court of the county palatine, and *Burn* in *Yorkſhire*, under proceſs of this Court.

The Court ſaid, that that circumſtance ſufficiently accounted for the miſtake; but that the proceedings were clearly irregular, and made the rule abſolute.

BELL and Others *againſt* JANSON.

Wedneſday, Feb. 10th.

ASSUMPSIT on a policy of aſſurance on goods. The plaintiffs, as the ſurviving partners of *William Bell*, declared that heretofore in the lifetime of the ſaid *William*, to wit, on the 27th of *March* 1810, at *London*, &c. they cauſed to be effected a certain writing or policy of aſſurance, purporting thereby, and containing therein, that the ſaid *William Bell*, *John Bell*, *Reuben Gaunt*, and *Walter*, by the name and deſcription of *William* and *John Bell* and Co. (the ſame then and there being the uſual ſtyle and firm of dealing of the perſons reſiding in *Great Britain*, *who received the order for and effected the ſaid writing or policy of aſſurance*) as well in their own names, &c. did make aſſurance, &c. at and from *Virginia* to her port or ports of diſcharge in the United Kingdom, or any port or ports in the *Baltic*, on goods on board the ſhip called, *The Ann, or ſhips*, or by whatſoever other name or names the ſhip was or ſhould be named. The declaration alſo alleged that afterwards, to wit, on the 30th *March* 1810, at *London*, &c. by a certain memorandum then and there written upon the margin of the ſaid policy, the intereſt inſured thereby was declared to be on board the *Herald*, Capt. *Barrow*. It then averred the intereſt in *John Bell*, and a loſs by capture. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after *Michaelmas* term, the policy was produced; which was dated and ſubſcribed on behalf of the defendant on the 27th *March* 1810; and contained the memorandum of the 30th as deſcribed in the declaration, ſigned alſo by the defendant. It appeared that the memorandum had been

Where the plaintiffs declared on a policy of aſſurance, and averred that they were the perſons reſiding in *Great Britain who received the order for* and effected the inſurance; this was conſidered as a material averment, and not ſuſtained by evidence of a letter received by them after the policy was effected, directing them to make aſſurance; although the policy was originally on goods on board the *Ann*, or ſhips, or by whatſoever other name the ſhip ſhould be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, ſigned by the defendant, declaring the intereſt to be on board the *Herald*, the ſhip mentioned in the letter.

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been procured by the plaintiffs on the 30th, in consequence of a letter received by them on that day from *John Bell* in *Virginia*, dated the 26th *January* preceding; which apprised them of his having purchased the ship *Herald*, and that he should load her with a cargo to their address, and requested them on the receipt of that letter to make assurance on the ship and cargo against all risks, in the same manner as done in late similar cases, (specifying the particulars of the insurance). The plaintiffs relied on this letter as proving their allegation "that they were the persons who received the order for effecting the assurance;" which assurance, although effected on the 27th, they contended was not completed until the memorandum was added, which was after the receipt of the letter. Lord *Ellenborough* C. J. was of opinion that the policy must be considered as having been completely effected on the 27th, the memorandum being only in the nature of a declaration of the interest previously insured; and that as the plaintiffs had alleged in their declaration that they were within one of the descriptions of persons mentioned in the stat. 28 *Geo.* 3. *c.* 56. they were bound to support that allegation by proving a previous order. The plaintiffs were thereupon nonsuited.

On a former day in this term *Park* obtained a rule nisi for setting aside the nonsuit; on the ground, 1st, that the averment that the plaintiffs were the persons who received the order for and effected the policy was an immaterial averment, and need not be proved: and secondly, admitting it to be material, that it was sufficiently proved by the letter of the 30th of *March*, which if not a previous order was equivalent to one, being an adoption of the insurance already effected on the 27th, and so would

relate back to the date of that insurance: and in support of this he referred to *Wolff* v. *Horncastle* (*a*), and *Stirling* v. *Vaughan* (*b*).

The Solicitor-General, *Holroyd*, and *Scarlett* now shewed cause, and insisted on the objection allowed by the Chief Justice at the trial, and the importance of maintaining a certain rule; and they added, that it had never been held that the recognition of an act done was tantamount to an order for doing it, although it might be an adoption of the act itself.

Park, *Marryat*, and *J. Warren*, contrà, maintained that what was laid down by *Buller* J. in *Wolff* v. *Horncastle* (*c*) was a strong authority on the second point, because it clearly shewed that a subsequent approval by the principal is enough to constitute the agent who effected the insurance, the person who received the order for effecting it. [Lord *Ellenborough* C. J. That is a part of Mr. J. *Buller*'s judgment to which I should hesitate to assent, because when the statute requires the names of a particular description of persons to be inserted in the policy, I doubt if the maxim that omnis ratihabitio retrotrahitur, &c. applies.] In *Lucena* v. *Craufurd* (*d*) the interest being averred in the king, the Chief Justice directed the jury that if any of his majesty's subjects effect an instrument for his benefit, his majesty may legally adopt and ratify the same; and the same doctrine was laid down in *Stirling* v. *Vaughan*. The act was intended only to prevent policies being effected in blank, but here the order was in existence

(*a*) 1 *Bos. & Pull.* 316. (*b*) 11 *East.* 623.
(*c*) 1 *Bos. & Pul.* 323. (*d*) 1 *Taunt.* 335.

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prior to the date of the policy, though it did not come to hand until a few days after.

The Court, however, were clearly of opinion that the nonsuit was right. As to the first ground, that perhaps the declaration might have been good without the averment in question, or have been cured by verdict, but it did not follow that because it was an unnecessary, it was therefore an immaterial averment: that it was material, inasmuch as the plaintiffs had taken upon themselves to allege they were within one particular description of persons mentioned in the act; and although without such averment, the Judge at the trial might have been bound only to see that they answered to any one of the descriptions specified in the act, yet now the plaintiffs had limited themselves to that precise description, and consequently were bound to prove it. As to the second ground, that the letter of the 30th could not be considered even as an adoption of the insurance; for at the time when it was written, the party was not aware of the insurance having been effected; and a person could not be said to adopt a thing of which he knew nothing at the time.

Lord ELLENBOROUGH C. J. added, that he was sorry these apices juris were relied upon, and that the Court, who were bound to pronounce upon them, had no pleasure in disappointing the expectations of parties suing, but that the certainty of the law was of infinitely more importance than any consideration of individual inconvenience.

It being suggested, however, that the plaintiffs had other evidence, the Court made the

Rule absolute on payment of costs.

GARNETT D. D. *againſt* GORDON D. D.

Thurſday, Feb. 11th.

ASSUMPSIT for money had and received, tried at the *London* ſittings after *Michaelmas* term 1811, before Lord *Ellenborough* C. J. when the jury found a verdict for the plaintiff, damages 10*l.*, ſubject to the opinion of the Court on the following caſe:

That in the cathedral church of *Exeter* there are prebendaries or canons who are nominated and collated by the Lord Biſhop of *Exeter* for the time being. That there are nine canons reſidentiary who are elected by the chapter of the ſaid church out of the prebendaries or canons aforeſaid, but ſuch canons reſidentiary retain their former prebend or canonry. That the chapter of the ſaid church is compoſed of the dean, who is always one of the canons reſidentiary, and of the other canons reſidentiary ſo elected as aforeſaid. That on the vacancy of the office of dean, and notification thereof to the biſhop, and on the iſſuing of letters patent by the crown, granting the deanery and requiring the chapter and canons to elect and admit the perſon nominated to the office of dean, the biſhop and chapter have been uſed to proceed in the following manner: If the perſon ſo nominated to the deanery was not at the time of his nomination a canon reſidentiary, the biſhop has by an inſtrument under his epiſco-

A ſtatute made in 1663 by the Biſhop, with the conſent of the Chapter, of *Exeter*, conferring upon every *canon* reſidentiary who ſhould ceaſe to be ſuch by *promotion to a higher degree and dignity* in the Church of England (unleſs it be by *voluntary reſignation*, &c.) the right of receiving to his own uſe the whole profits and advantages of the canonry for the following year, ſuppoſing ſuch a ſtatute to be valid, is at all events contrary to the policy of the eccleſiaſtical eſtabliſhment, and to be conſtrued ſtrictly: therefore, where the defendant, who was Dean and Canon of that Chapter, reſigned the ſame in order to obtain promotion to another deanery, to which he was ſhortly afterwards promoted: it was held that he was not within the ſtatute, not having ceaſed to be a member of the former church by promotion to the latter, but having ceaſed to be ſo before his promotion: and beſides, his reſignation having been voluntary, he was expreſsly excluded by the terms of the exception; and a promotion from one deanery to another ſeems not a promotion to a higher degree. The admiſſion of the plaintiff as Canon into plenum jus, although not made until a year after his firſt admiſſion, related back to the time when his title to the profits accrued, ſo as to enable him to maintain an action for them.

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epiſcopal ſeal collated the perſon ſo nominated, to the office of prebend holden by the late dean, and the chapter has afterwards elected ſuch perſon to the office of canon reſidentiary holden likewiſe by the late dean, who has been thereupon inſtalled, and afterwards the chapter has elected ſuch perſon into the office of dean. That if the perſon nominated to the deanery was at the time of his nomination a canon reſidentiary, then the prebend vacated by the late dean has been otherwiſe filled up. That the dean and other canons reſidentiary ſhare equally the profits of the common poſſeſſions of the dean and chapter, but there are other profits and poſſeſſions peculiarly belonging to the deanery. That the Biſhop of *Exeter* for the time being has been accuſtomed, with the conſent of the dean and chapter, to make ſtatutes reſpecting (amongſt other things) the common poſſeſſions of the dean and chapter. That in or about the year 1191, *Henry Marſhall*, then Lord Biſhop of *Exeter*, with the conſent of the chapter, made the following ſtatute: "Omnibus ad "quos præſens ſcriptum pervenerit, Henricus Dei gratiâ "Exon epiſcopus et capitulum beati Petri Exon æternam "in Domino ſalutem: cum ſemper pium ſit et ſalubre "humanæ conditionis imperfectioni et impotentiæ ſtudio "pietatis ſubvenire, tum maxime precioſæ devotionis "meritum pié completur et laudabiliter, cum juſte dece- "dentium voluntati, utilitati etiam et neceſſitati, prudenti "providetur induſtriâ; inde eſt quod ad univerſitatis "veſtræ notitiam volumus pervenire, quod nos, communi "concilio veſtro et unanimo aſſenſu, intuitu pietatis de- "crevimus de communiâ canonicorum eccleſiæ noſtræ "decedentium, talem diſpenſationem deinceps inviolabi- "liter obſervari; ſcilicet, quod quilibet canonicus eccle- "ſiæ noſtræ in extremis agens ad ſupplementum teſta- "menti

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" menti ſui communiæ proximi anni poſt deceſſum ejus " liberam in omnibus habeat diſpoſitionem, ita quod eam " quibus et in quos uſus pios voluerit integre poterit " aſſignare." That in the year 1553 *John Voyſey*, then Lord Biſhop of *Exeter*, with the like conſent made the following ſtatute: " Nihilominus tribuitur canonico " reſidenti defuncto ad ſupplementum teſtamenti ſui " communia proximi anni ſequentis poſt ejus deceſſum, " ita quod eam communiam quibus et ad quos uſus pios " diſponere voluerit, integre poſſit libere aſſignare. " Præterea antiquum illud eccleſiæ ſtatutum, et per 353 " annos aſſiduâ conſuetudine inviolabiliter obſervatum, " concedit canonico reſidenti qui compleverit primum " annum reſidentiæ, juxta formam ſtatutorum, ad ſup- " plementum teſtamenti ſui communiam eccleſiæ præ- " dictæ proximi anni ſequentis poſt mortem." That in *July* 1662 *Seth Ward*, one of the canons reſidentiary of the ſaid church, was promoted to the biſhoprick of *Exeter*, and was ſucceeded in his ſaid canonry by *John Snell*. That on the 27th of *March* 1663 the ſaid *Seth Ward*, then being Biſhop of *Exeter*, with the conſent of the chapter, made the following ſtatute: " Ut quilibet ex " novem canonicis reſidentiariis cui contigerit *ab hac* " *eccleſiâ amoveri*, ſive per mortem naturalem, ſive *per* " *promotionem ad altiorem gradum et dignitatem in ec-* " *cleſiâ Anglicanâ*, (*niſi ſit per voluntariam ceſſionem, aut* " *reſignationem*, aut deprivationem in foro civili aut " eccleſiaſtico) percipiet vel executoribus aut aſſignatis " ſuis in quos velit uſus legare et aſſignare poſſit, præter " proventum illius termini in quo moritur vel amovetur, " integram communiam, unius anni ſequentis, id eſt, " quotidianas diſtributiones in fine cujuſque termini, " necnon fines terrarum, maneriorum, firmarum, garba-

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" rum, domorum, et quas vocatis excreſcentias in fine " anni dividendas, oneribus debitis et conſuetis deductis, " pilulis beneficiorum, et pecuniis pro majoribus refec- " tionibus, exceptis et reſervatis." " Ut quilibet cano- " nicus ad reſidentiam admittendus, ſi nullam domum " ſuæ dignitati aut officio propriam, nec unam ex ſeptem " domibus canonicalibus, (prout nunc eccleſiæ ſtatus " eſt) poſſideat, aliam domum convenientem intra clau- " ſum ejuſdem eccleſiæ ſibi procurabit, in quâ primum " annum reſidentiæ ſuæ ſervare et hoſpitalitatem tenere " commode poſſit, niſi ex causâ rationabili per decanum " et capitulum (velut in præſenti neceſſitate) indulſum " fuerit. Neque ullus canonicorum ad reſidentiam ad- " miſſus percipiet quotidianas diſtributiones, vel alios " eccleſiæ proventus, præter ſex marcas ſterlingorum " nomine præbendæ ſuæ, prius quam primum annum " reſidentiæ ſuæ compleverit." " Quilibet *canonicus* qui " complevit primum annum reſidentiæ ſuæ, et proteſta- " tus eſt in capitulo ſe juſte compleviſſe, protenus ad- " mittetur ad *plenum jus*, et percipiet quotidianas diſtri- " butiones ſibi ob reſidentiam debitas, nec non fines pro " firmis, garbis, aut domibus elocandis, majores refec- " tiones, et pilulam beneficiorum, unà cum privilegio, et " beneficio anni poſt mortem aut promotionem ut ſupra " aſſignato, reſervatis tantum et exceptis excreſcentiis illius " anni quæ debentur executoribus aut aſſignatis illius ca- " nonici in cujus locum admiſſus fuerit. In cujus rei teſti- " monium, &c. Dat. Exon. 27 die Martii, A. D. 1663."

The ſeveral ſtatutes before mentioned ſtill remain in force. The caſe then ſet out a liſt containing all the caſes of avoidance of the office of canon reſidentiary, being ſeventeen in number, (otherwiſe than by death) from the year 1607 to the year 1810, by which it appeared that except

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in four inſtances the predeceſſor received the profits of the annus ſequens. That *Charles Talbot*, the perſon laſt named in the liſt, received the profits of the canonry for the year ſucceeding his reſignation; that he was ſucceeded in the deanery of *Exeter* by the defendant, who had been a canon reſidentiary for ſome years. That in the month of *January* 1810 it was ſignified to the defendant, that his majeſty would be pleaſed to promote him to the deanery of *Lincoln*, on condition however of his reſigning his deanery, prebend, and place of canon reſidentiary of *Exeter*. That the defendant, in order to obtain ſuch promotion, did on the 5th *February* 1810 reſign his deanery or office and dignity of dean into the hands of his majeſty, and his canonry or prebend into the hands of the biſhop of *Exeter*, which being accepted, the defendant was ſhortly afterwards promoted to the deanery of *Lincoln*, and on the 10th of the ſame month of *February* the biſhop of *Exeter* collated the plaintiff to the prebend or canonry then vacant by ſuch reſignation of the defendant. That on the 14th day of the ſame month of *February* his majeſty by his letters patent of that date, gave and granted to the plaintiff the deanery of the ſaid church, then vacant by the reſignation of the defendant, to hold to him for life with all the rights, profits, and emoluments thereto belonging, and required the chapter and canons to admit him accordingly. That on the 24th of the ſame month the plaintiff was duly admitted and inſtalled a prebendary. He was then elected, admitted, and inſtalled a canon reſidentiary, (to wit,) "into the place void by the reſignation of the defendant," and afterwards he was duly elected and has from thence hitherto been dean of the ſaid church. That on the 8th of *February* 1811 the plaintiff having completed one year's reſidence, was on

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his application by an act of the chapter pronounced full reſidentiary in the ſaid church, and capitularly admitted a full reſidentiary, with all the profits and emoluments belonging and appertaining to a full reſidentiary, to wit, a portion of *Stokewood* balls, ſortitions of benefices, the annus poſt mortem, with all other profits and commodities as the reſt of the canons theretofore admitted to full reſidence have been accuſtomed to receive. That the defendant has received by the hands of the chapter clerk the ſum of 10*l.*, being part of the profits of the ſaid canonry, which accrued ſubſequently to ſuch his reſignation, and ſubſequently alſo to the plaintiff's election, admiſſion, and inſtallation aforeſaid. That this action is brought by the plaintiff to recover the ſum ſo received by the defendant as aforeſaid. The queſtion is, whether the plaintiff is entitled to recover: if the Court ſhould be of that opinion, the verdict to ſtand; if not, a nonſuit to be entered. The reſignation of the defendant, which was dated 5th of *February* 1810, and agreed to be referred to, was in its terms a voluntary reſignation of the prebend or canonry and all its rights, &c. into the hands of the biſhop.

This caſe was argued in laſt *Michaelmas* term by *Burrough* for the plaintiff, and *P. Williams* for the defendant; but the Court in giving judgment went ſo fully into the grounds of their deciſion, that it precludes the neceſſity of entering farther into that part of the caſe. There were ſeveral other points made in argument, to which it will be enough ſhortly to advert. For the plaintiff it was contended, 1ſt, that the ſtatute of Biſhop *Ward* was void, being contrary to the reſtraining ſtatute 13 *Eliz. c.* 10., which was paſſed againſt the impoveriſhing

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ing of ſucceſſors; and *Gibſon's Codex*, 1 vol. 660. (note on that ſtat.) was cited, and alſo the caſe of *Magdalen College* (*a*), where it was ſaid that the act had been always conſtrued beneficially to prevent all inventions and evaſions. 2dly, That it was void at common law, inaſmuch as the former canon, when he ceaſed to be ſuch, was to be conſidered as a ſtranger to the church, and therefore the effect of the ſtatute was to divert the poſſeſſions of the church out of the channel in which by the common law they ought to be diſtributed, viz. for the maintenance of religion and the members of that body in whom they are veſted.

For the defendant it was anſwered, that this ſtatute was not within the 13 *Eliz. c.* 10., which only went to reſtrain the alienation of church lands by eccleſiaſtical bodies, and not (as was the caſe here,) the mode of regulating the diſtribution of the common funds of any eccleſiaſtical body amongſt the members of that body. As to its being void by the common law, ſeveral authorities to the contrary were cited, viz. *Viner's Abr.* tit. Cuſtom, 169., that a cuſtom need not be according to the common law. Ib. tit. Bye-laws, 306. *Danv. Abr.* tit. Bye-laws, B. 3. Tenants of a manor may make bye-laws to bind themſelves. 2 *T. R.* 630. *Radcliffe* v. *Doyly*, that this Court will take notice of ſuch a local ſtatute; and the *Canons*, 1317. Do. 1603, which although not held to be binding as part of the common law, *Middleton* v. *Croft* (*b*), are yet of great weight as they regard the clergy. And the caſe was likened to that of probationary fellowſhips or years of grace, which

(*a*) 11 *Rep.* 76. (*b*) *Str.* 1056.

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are well known in moſt of the colleges within our univerſities. If then the ſtatute be not void in itſelf, it may be expounded by the uſage which has prevailed with a very few exceptions, as appears from the liſt of avoidances. An objection was alſo taken that the plaintiff could not maintain the action in reſpect of the profits accruing before he was capitulariter admiſſus in plenum jus, which did not take place until after one year's reſidence: but to this it was anſwered that the plaintiff was admitted into plenum jus before the commencement of the action, and that ſuch admiſſion would relate back to the time when his title accrued.

Lord ELLENBOROUGH C. J. then ſaid, that if this caſe could be conſidered as involving any queſtion upon the validity of the ſtatute, as it might affect a vaſt number of bodies, particularly collegiate bodies, where ſtatutes reſpecting probationary fellowſhips exiſted, and all of which probably originated in the bodies themſelves, and not in the founders of thoſe bodies, it might become a queſtion of great magnitude and requiring the moſt ſerious conſideration. If it involved only a queſtion as to the conſtruction of this ſtatute, which might be the caſe, ſtill there was a ſufficient degree of nicety in that queſtion to make the Court pauſe before they decided. As to the objection made to the plaintiff's right to maintain the action, not having been admitted into plenum jus, his lordſhip ſaid that the anſwer given to it ſeemed to be ſufficient. On this day

Lord ELLENBOROUGH C. J. delivered the opinion of the Court. The queſtion ariſes upon a ſtatute of Biſhop *Seth Ward*, made in 1663 with the conſent of the chap-

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ter of *Exeter*. The ſtatute has been already ſtated. The object of this ſtatute is to confer upon every canon who ſhould ceaſe to be ſuch by natural death, or by promotion to a higher degree and dignity in the church of *England*, in the firſt caſe, that is, of death, the power of bequeathing or aſſigning for ſuch uſes as he ſhould think proper; in the latter, that of promotion, &c., the right of receiving for his own uſe, the whole profits and advantages of the canonry for the following year. Being of opinion upon the conſtruction of this ſtatute of 1663, (as upon full conſideration we are,) that the defendant's claim under it cannot be maintained, it is not abſolutely neceſſary for us to decide on the validity of ſuch ſtatute: it may be ſufficient to ſay that ſuch ſtatute appears to us ſubject to powerful objections. It may certainly be conſidered as made for the particular benefit of the then exiſting members of the chapter, who thereby acquired the contingent advantages of the year following the laſt of their incumbency in the caſes ſpecified; and to the prejudice of their ſucceſſors, who would neceſſarily become members of the body ſubject to the burthens of the annus ſequens in favour of their predeceſſors, without having had, as the makers of the ſtatute had, the benefit of an original incumbency free from this charge; except indeed as far as reſpected the power of bequeathing, in caſe of the canon's death, given to the predeceſſor by the former ſtatutes of Biſhop *Marſhall* and Biſhop *Voyſey*. The ſtatute being made under theſe queſtionable circumſtances, and contrary to the general policy and intereſts of the eccleſiaſtical eſtabliſhment, as the ſame may be not only inferred by reaſon, but collected from the 28 *H.* 8. *c.* 11. *f.* 2. which reprobates and prohibits certain contrivances by which the incoming clerk had,

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over and above the firſt fruits due to the king, "been "conſtrained to loſe all or moſt part of one year's pro- "fit of their benefices and promotions, and to ſerve the "cure at their or their friends' proper coſts and charges, "or utterly to forſake and give over their benefices and "promotions, to their great loſs and hindrance:" I ſay a ſtatute made as this in 1663 was, and attended with theſe conſequences, requires at any rate to be conſtrued ſtrictly and according to its very letter, and not favourably and beneficially for the intereſts of thoſe who had ceaſed to be, and to the prejudice of thoſe who became, the members of the body, to be affected by this private ſtatute. Applying this rule of conſtruction to the words in queſtion, the claim on the part of the defendant will on examination be found not only to reſt upon no words competent to ſuſtain and include it, but to be excluded by expreſs words competent to exclude it. The words under which this right muſt be claimed are theſe: "cui contingat ab hac eccleſiâ amoveri per pro- "motionem ad altiorem gradum et dignitatem in eccle- "ſiâ Anglicanâ." Now has the defendant, who claims in this caſe, been in fact amoved from the chapter of *Exeter* per promotionem? So far from being amoved by promotion, he had in fact ceaſed to be a member of the church of *Exeter* before his promotion to the deanery of *Lincoln* took place, and his ceaſing to be a member of the former church was made the very condition upon which his promotion to the deanery of the latter was afterwards to take place. So far was he from being literally amotus per promotionem, that he removed himſelf, in order to become the object of a promotion, promiſed to him only upon the condition of his antecedent ſelf-removal or reſignation. If indeed he had been re-

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moved by the immediate effect and conſequence of promotion, it would ſtill be highly difficult to eſtabliſh that the promotion in this caſe was a promotion ad altiorem gradum, &c. The promotion, in ſubſtance, is only from one deanery to another; offices of equal rank, degree, and dignity in the church; though one of them be more eligible in point of pecuniary emolument or other advantages than the other. The defendant reſigned both his deanery and canonry of *Exeter* on the ſame day; the one to the king, the other to the biſhop: which of them he reſigned firſt does not appear; neither is it material, as he quitted each by an act of reſignation, and in order to obtain the promotion to the deanery of *Lincoln*, to which it appears that he was ſhortly afterwards promoted. His ceaſing to be dean and canon of the one church, and his becoming dean of the other, were not legally connected as cauſe and effect: if they had been ſo, the ſuppoſed cauſe, namely, the promotion in the church of *Lincoln*, would have neceſſarily preceded the ſuppoſed effect, viz. the removal from the church of *Exeter*: but the contrary was the caſe. In a word, a prior promotion at *Lincoln* was not the cauſe of a ſubſequent or contemporary vacancy at *Exeter*; but the expectation of a future promotion at *Lincoln* was the motive and inducement to a prior reſignation at *Exeter*: and in that way only did the promotion at *Lincoln*, not actual but future, uncertain and reſting in expectation alone, operate to produce the vacancy upon which the queſtion ariſes. Thus much as to the words amoveri per promotionem ad altiorem gradum, &c.; which are, I think, ſufficiently ſhewn, according to the ſtrict literal ſenſe of them, not to ſuſtain the claim contended for; but if they could be ſuppoſed to do ſo, the claim is ex-

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preſaly excluded by the terms of the exception contained in the ſtatute, viz. "niſi ſit per voluntariam ceſſionem aut reſignationem, aut deprivationem in foro civili aut eccleſiaſtico." Now can this poſſibly be deemed any other than a voluntary reſignation of the deanery and canonry of *Exeter*, in order to obtain the future grant of the deanery of *Lincoln*, which it had been ſignified to the defendant that he might obtain on that condition? It was unqueſtionably voluntary, for it was the uncompelled election of a greater advantage, to be obtained afterwards, by the ſurrender of a leſs, which was to be parted with immediately: and the mode in which it was parted with was the one ſpecifically mentioned in the exception, viz. that of *reſignation*. Unleſs therefore, we can, in favour of ſome ſuppoſed intention of the framers of the ſtatute, depart from the language uſed in it, and ſubſtitute, in the place of the words "by promotion," the words "means uſed in order to obtain promotion," we ſhall not bring the caſe even colourably within the firſt branch of the ſtatute: and when we have done ſo, the expreſs language of the exception, which excludes *voluntary reſignation*, (the immediate cauſe of the vacancy in queſtion,) at any rate puts an end to the claim altogether.

Poſtea to the Plaintiff.

ROBINSON and Others *againſt* TOURAY.

Thurſday, Feb. 11th.

THIS caſe was argued in *Eaſter* term laſt upon a rule niſi for a new trial, by the *Attorney-General*, *Park*, and *Gaſelee*, againſt the rule; and by *Garrow*, *Nolan*, and *Carr*, contrà. The caſes of the *Couſine Marianne* (*a*), *Uſparicha* v. *Noble* (*b*), and *Rawlinſon* v. *Janſon* (*c*), were cited by the former: thoſe of the *Coſmopolite* (*d*), *Feize* v. *Thompſon* (*e*), *Feiſe* v. *Waters* (*f*), and the caſe of the *Hoffnung* (*g*) by the latter. The caſe was adjourned for conſideration, and on this day

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This was an action upon a policy on goods by ſhip or ſhips from *Archangel* to *London*. It was afterwards declared to be on the *Neptunus*; but that declaration was cancelled, and it was declared to be on the *America*. The intereſt in the goods was averred to be in *Brandt*, *Rodde*, and Co., who are *Ruſſians*. The cauſe was tried at *Guildhall* at the ſittings after *Michaelmas* term 1811, when it appeared in evidence that *Henry Siffken*, a reſident *Britiſh* merchant, was employed on behalf of *Brandt*, *Rodde*, and Co. to obtain a licence for them, and had

A licence granted under an order in Council to *H. S.* (a *Britiſh* reſident merchant), permitting a veſſel, bearing any flag except the *French*, to proceed in ballaſt from any port north of the *Scheldt* to *Archangel*, there to load a cargo of ſuch goods as are permitted by law to be imported, and proceed with the ſame to a port in the United Kingdom, was conſidered as not confined perſonally to *H. S.*, or any particular claſs of perſons: and therefore where *Ruſſian* ſubjects at *Archangel*, who were alien enemies, had ſhipped goods under ſuch licence for the purpoſe of being brought into this country, it was held that they were protected by it; and an inſurance made for their benefit was legal.

A miſtake made by the agent in declaring the intereſt in the margin of the policy to be on a ſhip by a wrong name, may be rectified by inſerting the true name, without a freſh ſtamp.

(*a*) 1 *Edw. Adm. Rep.* 346. (*b*) 13 *Eaſt*, 332. (*c*) 12 *Eaſt*, 223.
(*d*) 4 *Rob. Adm. Rep.* 8. (*e*) 1 *Taunt.* 121. (*f*) 2 *Taunt.* 248.
(*g*) 2 *Rob. Adm. Rep.* 163.

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petitioned the Privy Council accordingly, and had thereupon obtained a licence, dated the 14th of *March* 1810, in theſe terms: In purſuance of an order of council, ſpecially authorizing the grant of this licence, a duplicate of which order of council is hereunto annexed, I do hereby grant this licence for the purpoſe ſet forth in the ſaid order of council to *Henry Siffken, and do hereby permit a veſſel, bearing any flag except the* French, to proceed in ballaſt from any port, north of the *Scheldt*, to *Archangel*, or any other port in the *White Sea*; there to load a cargo of ſuch goods as are permitted by law to be imported, (except *German* linens, ſtock fiſh, and oil,) and to proceed with the ſame to a port in the United Kingdom (*a*). Annexed to the licence is a duplicate of the order in council authorizing the ſame; ſtating it to be on the petition of *Henry Siffken*. The ſhip was admitted at the trial to be a neutral ſhip, viz. a *Roſtock* ſhip. A motion was made to ſet aſide a verdict, which was given for the plaintiffs for the amount of the goods loſt, on two grounds; firſt, that the declaration of the ſhip in the margin of the policy was not on a freſh ſtamp (*b*). But the Court refuſed the rule on that point. The ſecond ground, on which the Court granted the rule to ſhew cauſe, was, that this licence did not authorize the importation of goods, the property of an enemy, as theſe goods were. This caſe was argued on ſhewing cauſe

(*a*) The licence went on thus; "The maſter to be permitted to receive his freight and depart with his crew and veſſel to any port not blockaded: notwithſtanding all the documents which accompany the ſhip and cargo may repreſent the ſame to be deſtined to any neutral or hoſtile port, and *to whomſoever ſuch property may appear to belong*, &c.

(*b*) The firſt declaration on the *Neptunus* was made by the agent through miſtake, and, as ſoon as it was diſcovered, was reſtified by altering the name to the *America*.

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againſt the rule for a new trial in *Eaſter* term laſt, when it was contended that the licence was perſonal to *Siffken*, and being ſo could not extend beyond him or perſons ejuſdem generis; and at any rate not to alien enemies. It was not denied but that the Privy Council had power to authorize an enemy to import goods; but it was ſaid that in ſuch caſe it ſhould be directly ſo expreſſed in the licence; and that it was not ſo in the preſent caſe. But we think that by the terms of this licence the privilege is not perſonal to *Siffken* or to any particular claſs of perſons: it is obtained, as it ſtates on the face of it, upon the petition of *Siffken*, and therefore it may be that ſome degree of confidence placed in him, that the licence granted upon his petition ſhould not be abuſed, might operate as an inducement to the granting of it: his name is inſerted in the licence, as petitioning for it, and no more: but what is the licence granted for? It is for a veſſel, *bearing any flag except the* French, to proceed in ballaſt from any port north of the *Scheldt* to *Archangel*; there to load a cargo of ſuch goods as are permitted by law to be imported. The object of this licence is manifeſtly, upon the face of it, to procure a cargo of *Ruſſian* goods to be brought into this country. It is not ſpecifically to *Siffken*, or to any other perſon, to import, but for *any ſhip*, except a *French* flag, *to import*: ſo that it would authorize a *Ruſſian* ſhip. She is to proceed alſo in ballaſt: there is no neceſſity to take out a cargo of *Britiſh* manufacture or colonial produce: ſo that the ſole object is moſt clearly *to bring in* Ruſſian *goods*, without any reſtriction as to perſon or ſhip, except that the ſhip ſhould not bear the *French* flag. Under a licence couched in ſuch terms, we do not feel ourſelves warranted in ſaying that a *Ruſſian* ſubject may not ſhip goods on board ſuch veſſel

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veſſel for the purpoſe of their being brought hither, as well as ſell them at a *Ruſſian* port to a *Britiſh* or neutral merchant, for him to import them at his riſk; and if ſo the *Ruſſian* may, as a conſequence of ſuch right to import, legally make a contract to indemnify himſelf againſt loſs during the voyage. Whatever doubts may have occurred on the effect of licences drawn up in different terms, we all agree in thinking that under this licence the inſurance made for the benefit of the *Ruſſian* houſe, although ſtanding in a hoſtile relation to this country at the time, is legal. This ſame queſtion has lately been under the conſideration of the court of Common Pleas in the caſe of *Morgan* v. *Oſwald*; and we underſtand that Court in the courſe of the laſt term gave the ſame effect to a licence ſimilarly worded; indeed it appears to be the ſame licence. The conſequence is, that the verdict which has been found in this caſe for the plaintiff muſt ſtand, and the rule which has been obtained to ſhew cauſe why it ſhould not be ſet aſide muſt be diſcharged.

Rule diſcharged.

SAME *againſt* CHEESEWRIGHT.

LORD ELLENBOROUGH C. J. alſo delivered the opinion of the Court in this caſe, which he obſerved was under the ſame circumſtances as *Robinſon* v. *Touray*, at leaſt as to the point on which the Court granted the rule to ſhew cauſe; for although other objections were taken, the Court diſpoſed of them on the motion for the rule, and only granted it on the objection reſpecting the licence, whether it protected enemies' property. The verdict therefore in this caſe alſo muſt ſtand. And the rule be diſcharged.

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The KING *againſt* The Inhabitants of DENHAM.

Thurſday, Feb. 11th.

The 40 days reſidence neceſſary to confer a ſettlement by hiring and ſervice, muſt be within the compaſs of a year.

UPON appeal, the quarter ſeſſions for the county of *Southampton* confirmed an order for the removal of *Charles Tranter*, his wife and family, ſubject to the opinion of this Court on a caſe ſtated. The caſe was argued in *Michaelmas* term laſt by *Maule* in ſupport of the order of ſeſſions, and by *Gaſelee* and *Selwyn* contrà. The Court took time to conſider; and on this day

Lord ELLENBOROUGH C. J. delivered the judgment.

This was a ſettlement caſe upon a removal from *Baſingſtoke* to *Denham*, and the queſtion was upon the reſidence neceſſary to confer a ſettlement by hiring and ſervice, whether it was neceſſary there ſhould be 40 days reſidence within the compaſs of a year; or whether, if the ſervice were for ſeveral years uninterruptedly, a reſidence of 40 days within thoſe ſeveral years would be ſufficient. The facts were theſe; the pauper was hired for a year to *George Smith*, and ſerved that year: at the expiration of which he was hired to him for another year, and ſerved half of it; and during that year and a half he was reſident in *Baſingſtoke* for 40 days, but he did not reſide in *Baſingſtoke* for 40 days either within the firſt year, or within the half year, nor (as was admitted) within any one period of a year whilſt he continued with *Smith*. The ſeſſions were of opinion that this reſidence was not ſufficient, and we think their opinion right. By ſtat. 13 & 14 *Car.* 2. *c.* 12. *ſ.* 1. poor perſons coming to ſettle in any pariſh, if likely to be chargeable to the pariſh, may be removed within 40 days after they

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so come to settle as aforesaid; and it is under this act that 40 days residence is required. By stat. 1 *Jac.* 2. *c.* 17. *s.* 3. the 40 days continuance in a parish, intended by the stat. 13 & 14 *Car.* 2. to make a settlement, shall be accounted from the delivery of notice in writing to one of the officers of the parish to which such poor person removes; which notice, by stat. 3 & 4 *W.* & *M.* *c.* 11. *s.* 3., is to be read in church the next *Lord's-day*, and registered in the book kept for the poor's accounts. By the same statute 3 & 4 *W.* & *M.* *c.* 11. *s.* 7. if any unmarried person, not having child or children, shall be lawfully "hired into any parish or town for one year, "such service shall be adjudged a good settlement there-"in, though no such notice in writing be delivered and "published as aforesaid." And by stat. 8 & 9 *W.* 3. *c.* 30. *s.* 4. "No person, so hired as aforesaid, shall be "adjudged to have a good settlement in any such parish "or township, unless such person shall *continue and abide* "in the same service during the space of *one whole year*." Upon these clauses settlements by hiring and service now stand. It has been decided that so as there is a hiring for a year, and service for a year, it is not necessary the whole of the service should be under the yearly hiring, but service not under a yearly hiring may be connected with service under a yearly hiring, and both services, if uninterrupted, may be taken into the account: but it has never been decided that residences beyond the compass of a year can be connected; and as the legislature, by requiring a hiring for a year, and a continuance and abiding in the same service during the space of one whole year, seem to have contemplated something which was not to be complete in less than a year, but was to be complete within that period; we think

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think we abide moſt cloſely by the words, and give effect to the moſt probable intention of the legiſlature, by holding that the whole reſidence muſt be within the compaſs of a ſingle year. Suppoſe the ſame ſervice to continue uninterruptedly for 20 years, and the ſervant to ſleep twice in every of ſuch 20 years at the ſame inn in travelling, and to be at that inn the laſt night of his ſervice, would it be expedient and reaſonable that an inquiry extending over ſo long a period of time at detached intervals ſhould be gone into for the purpoſe of aſcertaining the ſettlement of a pauper? What notice could the officers of that pariſh have had that he was come to ſettle there? and yet there his ſettlement would be, if we were to hold that reſidence for 40 days beyond the compaſs of a ſingle year would do. We are therefore of opinion that a ſettlement in *Baſingſtoke* in this caſe was not eſtabliſhed, and that the order of removal and the order of ſeſſions, which proceeded upon the diſallowing the ſettlement, ſhould be confirmed.

SAMUEL PAYNE and JOHN THOROUGHGOOD'S Caſe.

Thurſday, Feb. 11th.

SCARLETT on a former day in this term obtained a rule niſi for a writ of habeas corpora to the commander of his majeſty's ſhip *Muſquito*, to bring up *John Thoroughgood* and *Samuel Payne* for the purpoſe of being diſcharged, as having been illegally impreſſed.

By the affidavits in ſupport of the rule it appeared that ſeveral perſons who were the owners of fiſhing ſmacks at

The 50 *G.* 3. *c.* 108. *ſ.* 2., which exempts certain perſons, who ſhall be employed in *the fiſheries of theſe kingdoms*, from being impreſſed, extends to a lobſter fiſhery, carried on by *Britiſh* ſubjects upon the coaſt of *Heligoland* for the purpoſe of ſupplying the *London* market with that fiſh: and therefore the Court diſcharged a mariner and an apprentice who had been impreſſed out of one of the veſſels engaged in that fiſhery.

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Harwich, had formed themſelves into a company for carrying on the lobſter fiſhery upon the coaſt of *Heligoland*, in purſuance of which plan in the ſpring of 1812 they ſent out eight ſtrong-built veſſels, furniſhed with wells, fiſhing nets and baits, &c. and with 24 boats of a peculiar conſtruction, and adapted to the ſaid fiſhery, beſides the boat attached to each ſmack upon the ordinary fiſhing buſineſs. The mode of conducting this fiſhery was as follows: all the veſſels of the company ſailed nearly together in the beginning of the ſeaſon, and when arrived at their ſtation the boats, maſters and crews were engaged in catching the lobſters, with which they ſupplied ſuch veſſels of the company as were ready for the *London* market. The veſſels when loaded immediately ſailed for *London*, and delivered the lobſters at *Old Haven* for the *London* market, and then returned with all diſpatch to their ſtation. The nets, &c. after being carried out on the firſt voyage, remained at *Heligoland* until the fiſhing ſeaſon was over. The fiſhing for lobſters is uſually in water from 7 to 12 fathoms deep, and hardly ever ſo ſhallow as 2 fathoms. The *Adventure*, one of the eight veſſels abovementioned, was of the burthen of 59 tons, and regularly cleared out at the cuſtom-houſe at *Harwich* for the voyage in queſtion, and had a licence to be employed in fiſhing for lobſters at *Heligoland*. On the 1ſt *June* 1812 ſhe was in the North Sea, about 40 miles to the weſtward of *Heligoland*, bound to the ſaid iſland for the purpoſe of catching lobſters for the *London* market, when an officer of the *Muſquito* came on board and impreſſed *Payne* and *Thoroughgood*. *Payne* was a mariner of the age of 29 years, regularly bred to the fiſhing buſineſs; and *Thoroughgood*, (of the age of 19 years) was apprentice to the owner of the *Adventure*, bound for 7 years, to learn the

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the art of a fiſherman; and both of them, at the time of their being impreſſed, were employed in the fiſhing ſervice, and had regular admiralty protections. The iſland of *Heligoland* ſurrendered to his majeſty's forces on the 1ſt *September* 1807. The exemption from being impreſſed was claimed under the ſtat. 50 *Geo.* 3. *c.* 108. *ſ.* 2.

The Solicitor-General and *Jervis*, who now ſhewed cauſe, contended that theſe perſons came neither within the ſtat. 2 *Geo.* 3. *c.* 15. nor the ſtat. 50 *G.* 3. *c.* 108. The firſt of thoſe acts applied only to perſons fiſhing on the coaſts and in the navigable rivers of *Great Britain*: the ſecond to thoſe who fiſhed in deep waters: and although ſect. 2. includes perſons employed *in the fiſheries of theſe kingdoms*, yet it can hardly be intended by that expreſſion that it contemplated a fiſhing off *Heligoland*; and even if it did, ſtill that expreſſion muſt be controlled by the words uſed in the preamble, otherwiſe it would include every fiſhery of what kind ſoever, whereas the words of the preamble do not extend beyond fiſhing in the deep ſeas. But lobſters are a ſpecies of fiſh only to be found in ſhoals among rocks, and are caught, not in boats or by means of implements uſed for fiſhing in deep waters, but in ſkiffs with lobſter pots: and although larger veſſels may be neceſſary in order to navigate in deep waters to and from the fiſhing ſtation, that is only preliminary to the fiſhing.

Topping and *Scarlett* in ſupport of the rule, inſiſted that the words in the 2d ſect. were not to be reſtrained by the preamble in the manner contended for; and then, the

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only queſtion was, whether this could be deemed a fiſhery of this kingdom: as to which it appeared, that it was a fiſhery carried on by *Britiſh* ſubjects, and in veſſels, and with a capital all *Britiſh*, and the produce of which was brought into the markets of this country. They were proceeding in the argument, but were ſtopped by

Lord ELLENBOROUGH C. J. I think the policy of the legiſlature is deſcribed in the preamble of this act of parliament, and its object ſeems to have been directed to the better ſupplying the inhabitants of the metropolis and other parts of the kingdom with fiſh, and for that purpoſe to bring ſound and wholeſome fiſh at a moderate price to the different markets of the kingdom. It is contended however by thoſe who oppoſe this rule, that this act of parliament only extends it's protection to thoſe who are engaged in fiſhing in deep waters, and that lobſters are found in ſhallow water. Now the act recites that it has been found ſince the paſſing of the 2 *Geo.* 3. *c.* 15. that various ſorts of fiſh retire in the winter ſeaſon into deeper water, and it has therefore become neceſſary for the ſupply of the metropolis and other parts of the kingdom with ſuch fiſh at all ſeaſons of the year, to uſe larger claſſes of fiſhing veſſels, which cannot be navigated without a greater number of hands than are exempted by the former act, and that the encouraging the taking of apprentices is highly beneficial in eſtabliſhing a nurſery for his majeſty's navy; and it is therefore expedient that the proviſions of the former act for exempting perſons employed in the veſſels therein deſcribed, ſhould, as to all fiſhing veſſels, be extended to fiſhing in the deep ſeas beyond the coaſts, &c. The 2d ſect. then enacts, "that every perſon

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perſon therein ſpecified who ſhall be employed in the fiſheries of *theſe kingdoms* ſhall be exempted from being impreſſed, except in certain caſes." Theſe words are large enough to embrace the preſent caſe; and it would have been eaſy for the legiſlature, if they had intended to narrow the privilege to thoſe who fiſhed in deep waters only, to have uſed apt words for that purpoſe by recurring to the words recited in the former ſection. Inſtead of that, however, in furtherance of the general policy of the former act, which was to ſupply the metropolis with fiſh at a moderate rate, the legiſlature has adopted a larger form of expreſſion by propoſing generally that thoſe employed in the fiſheries of theſe kingdoms ſhould be protected. The queſtion then is reduced to this, viz. what is meant by the "fiſheries of theſe kingdoms." Theſe kingdoms have coaſts, and what may be termed a land juriſdiction, extending between high and low water mark, in contradiſtinction to the admiralty juriſdiction. That would clearly be too narrow a conſtruction of the words. But then when we get beyond that to the "deep ſeas beyond the coaſt," a difficulty ariſes in defining how far they ſhall extend, and therefore the legiſlature ſeem to have defined it by the words "fiſheries of theſe kingdoms," which are words of a large ſcope, embracing all thoſe fiſheries from which fiſh are ſupplied in a freſh and wholeſome ſtate to the markets of theſe kingdoms. The act therefore muſt be taken to mean all ſuch fiſheries within the neighbourhood of theſe kingdoms, which are capable of contributing and do contribute to the better ſupply of the markets of theſe kingdoms with freſh fiſh: and all who are engaged in ſuch fiſheries under certain limitations ſeem to be

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within the policy of the act. I therefore think these two persons are entitled to their discharge.

LE BLANC J. I am of the same opinion. We must look to the former statute for the true construction of this. The principal object of that statute, as its title imports, was the better supplying the inhabitants of this metropolis with fish, and the reduction of the exorbitant price of that article. In it there are many regulations which do not apply to the protection of the fishermen: then comes the clause that protects them under certain limitations. Afterwards, it appears to have been thought expedient to provide for the supply of the markets of *these kingdoms* with wholesome and sound fish brought from a greater distance; for the 50 *G.* 3. recites, that the fish at a certain season retire into deeper water, and it has therefore become necessary for the supply of the metropolis, and other parts of the kingdom, to use a larger class of vessels. Then the act repeals the former, and extends the protection to all persons employed in the *fisheries of these kingdoms*. Under these words therefore I think we may fairly comprehend those persons who are employed in supplying the *London* markets with good and wholesome fish. It is said that the vessels immediately employed in fishing are very small vessels or skiffs: but it is clear that much larger vessels are indispensably necessary to carry both them and the fishermen through the deep seas, and that they are equally necessary after the fish are taken to bring them home to the markets of *Great Britain*.

BAYLEY J. I am of the same opinion. By the first act there were four descriptions of persons who should

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be employed in the fiſheries of theſe kingdoms exempted from being impreſſed. The 50 *G.* 3. *c.* 108. repealed that act, but it alſo extended the privileges in reſpect of veſſels of larger burthen.

Rule abſolute.

BERGER *againſt* GREEN.

Thurſday, Feb. 11th.

Where interlocutory judgment was ſigned, and the plaintiff died on a ſubſequent day in the term; the Court granted a rule to compute principal and intereſt on the bill on which the action was brought.

LAWES ſhewed cauſe againſt a rule obtained by *Eſpinaſſe* for referring a bill of exchange to the maſter to compute principal and intereſt, on the ground that the plaintiff was dead at the time when the rule was obtained. It appeared that interlocutory judgment was ſigned on the 27th of *January* laſt, that the plaintiff died on the 30th, and that this rule was granted on the 1ſt of *February*. He contended that the ſuit abated by the plaintiff's death, after which the only mode of proceeding was that pointed out by 8 & 9 *W.* 3. *c.* 11. *ſ.* 6., viz. by a ſcire facias, and that the Court would not permit final judgment to be ſigned for the plaintiff according to the terms of the rule.

Eſpinaſſe, contrà, maintained that the whole term was to be conſidered as one day, and that when final judgment was ſigned it would relate back to the firſt day of the term, which was prior to the plaintiff's death; and that this was analogous to a caſe at the aſſizes, where if a party died between the commiſſion day and the day of trial, the cauſe might notwithſtanding be tried. He relied on *Bragner* v. *Langmead* (*a*)

(*a*) 7 *T. R.* 20.

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LE BLANC J. (*a*). It is perfectly clear that final judgment may be signed notwithstanding the death of the party, and that the Court will not set it aside on account of his death, before it was signed. This is an application merely to inform the Court for what damages judgment may be signed, and if this preliminary step were not necessary, the party might at once sign final judgment. If then the Court would permit final judgment to be signed, notwithstanding the death of the party, they will hardly on that account refuse this rule, which is only a means of getting final judgment. When signed it will relate back to the first day of the term, and error will not be assignable, for it will not appear on the record that the party was dead before final judgment was signed. The defendant cannot sustain any injury, because execution cannot go against him without a scire facias.

BAYLEY J. concurred.

Rule absolute.

(*a*) Lord *Ellenborough* C. J. was absent.

Thursday, Feb. 11th.

DALTON *against* BARNES.

A special capias issued upon an affidavit sworn at the bill of *Middlesex* office is irregular: but if the defendant be arrested under it, and put in special bail, he thereby waves the irregularity.

THE defendant in this cause having been arrested upon a special capias, a rule was obtained by *Taddy* for discharging him on entering a common appearance, on the ground that the affidavit of debt, upon which the writ issued, was sworn at the office where bills of *Middlesex* issue, and not before the filazer or his deputy.

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Marryat, who ſhewed cauſe againſt the rule, admitted that the affidavit was not ſworn before the proper officer, but contended that the practice was for the filazer, upon tranſmitting to him either the original affidavit or an office copy of it, to iſſue his writ: but the Court ſaid that ſuch could not be the practice, for that an affidavit made for one ſpecific object could not be transferred to another, and perjury could not be aſſigned on the office copy. He then contended that the want of an affidavit had been waived by the defendant's having put in ſpecial bail.

Taddy, in ſupport of the rule, inſiſted that the arreſt was illegal, for want of an affidavit made before the proper officer, as required by ſtat. 12 *G.* 1. *c.* 29., and therefore what was done by the party as to putting in bail was to be conſidered as having been done under dureſs, and conſequently void. He relied upon what was ſaid by Lord *Kenyon* C. J. in *Norton* v. *Danvers* (*a*), "that if the defendant had been actually under arreſt at the time, his conſent to give a bail bond would not have been binding, becauſe it might be conſidered as given under dureſs." He alſo cited *Reeks* v. *Groneman* (*b*).

Lord ELLENBOROUGH C. J. The recognizance of bail does not import neceſſarily that there was an affidavit to hold to bail; it is not per ſe neceſſarily founded thereon. I think there was an irregularity; but there is a time for taking notice of ſuch irregularities, and if that is ſuffered to elapſe, the party muſt be conſidered as having diſpenſed with it.

(*a*) 7 *T. R.* 376. (*b*) 2 *Wilſ.* 224.

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LE BLANC J. concurred.

BAYLEY J. added, that there was not any instance in which the party after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail.

Rule discharged.

Friday, Feb. 12th.

RANDOLE *against* BAILEY and Another. In Error.

The clerk of the errors in *C. P.* in transcribing the record, by mistake entitled it generally instead of specially, and error was assigned thereon; after which he amended the transcript by inserting the special memorandum; the Court would not restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error.

IN this case the defendants in error declared in the Common Pleas, as drawers, against the plaintiff in error, as acceptor of a bill of exchange, which became due on a day in *Trinity* term. The declaration was specially entitled as of a subsequent day in that term. Plea, Judgment recovered. Replication, nul tiel record, and thereupon final judgment for the defendant in error. A writ of error was brought in this court, and the clerk of the errors in transcribing the record, instead of entitling the declaration specially, entitled it generally; and the plaintiff assigned this for error. Afterwards the clerk of the errors altered the transcript by inserting the special memorandum as it originally stood: whereupon *Marryat* obtained a rule, calling on the defendants in error to shew cause why the transcript of the proceedings should not be restored to the state in which it stood at the time when the plaintiff in error assigned his error.

Scarlett and *Comyn* opposed the rule, on the ground that the clerk of the errors, in transcribing the record, acted as the agent of the plaintiff in error; and therefore

fore the miſtake muſt be conſidered as the miſtake of the plaintiff himſelf; and ſo he ought not to be permitted to avail himſelf of it.

Marryat, in ſupport of the rule, maintained, that although the Court, upon application, might have granted liberty to amend, yet the officer, even with the conſent of the parties, could not make the amendment; much leſs could he do ſo without their conſent. If the party himſelf was at liberty to amend without leave of the Court, there never would be occaſion for alleging diminution. And he relied on *Dickinſon* v. *Plaiſted* (*a*), where the Court held that the plaintiff himſelf could not alter the roll by inſerting a ſpecial inſtead of a general memorandum.

BAYLEY J. (the only Judge in court,) obſerved, as to that caſe, that the alteration was not warranted by the original record; and as to the principal caſe, delayed giving judgment until the court was full; and then, after conference with the other learned Judges, ſaid, that it ſeemed to them, that as the clerk of the errors was the agent of the plaintiff in error in making the tranſcript, and the plaintiff, through him, ought to have known that the record was incomplete without the alteration, therefore the clerk ſhould have authority to make it complete; and that the rule ought to be

Diſcharged.

(*a*) 7 T. R. 474.

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JACKSON *againſt* PESKED.

If the plaintiff declare as reverſioner for an injury done to his reverſion, the declaration muſt allege it to have been done to the damage of his reverſion, or muſt ſtate an injury of ſuch a permanent nature as to be neceſſarily injurious to his reverſion; otherwiſe the want of ſuch allegation will be cauſe for arreſting the judgment: therefore where the plaintiff declared as reverſioner of a yard and part of a wall which *W. F.* occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the ſaid part of the wall quantities of bricks and mortar, &c., and thereby raiſed it to a greater height than before, and placed pieces of timber, &c. on the ſaid wall, overhanging the yard, per quod the plaintiff during all the time loſt the uſe of the ſaid part of the wall, and alſo by means of the timber &c overhanging the wall, quantities of rain and moiſture flowed from the wall upon the yard, and thereby the yard and ſaid part of wall have been injured, to the damage of the plaintiff, &c.; without ſtating that his reverſion was prejudiced: the Court arreſted the judgment.

ACTION upon the caſe. The declaration ſtated, that before and at the time of committing the grievances hereinafter mentioned, a certain yard and part of a certain wall, ſituate, &c. was in the poſſeſſion and occupation of one *William Friſk*, as tenant to the plaintiff, the reverſion thereof then and ſtill being in the plaintiff, to wit, at, &c.; yet the defendant well knowing the premiſes, but intending to injure and aggrieve the plaintiff in his reverſionary eſtate and intereſt of and in the ſaid yard and the ſaid part of the ſaid wall, heretofore and whilſt the ſaid yard and the ſaid part of the ſaid wall were ſo in the poſſeſſion and occupation of *Friſk* as tenant of the plaintiff, and whilſt the plaintiff was ſo intereſted therein as aforeſaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, at, &c. wrongfully, injuriouſly, and without leave and againſt the will of the plaintiff, erected, put, and placed upon the ſaid part of the ſaid wall divers large quantities of brick and mortar and other materials, and thereby raiſed the ſaid part of the wall to a great height, to wit, the height of three feet more than the ſame had been before that time, and alſo put and placed divers pieces of wood and timber, and tiles upon the ſaid wall overhanging the ſaid yard, to wit, at, &c.;

by

by reaſon whereof, &c. (*a*) After verdict for the plaintiff on the general iſſue, with 1*s*. damages, a motion was made in arreſt of judgment: againſt which *Jervis* and *Comyn* ſhewed cauſe, and *Lawes* was heard in ſupport of it, on a former day in this term.

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JACKSON *againſt* PESKER.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action by a reverſioner for an injury done to a yard and part of a wall of which the reverſion belonged to him, and the plaintiff obtained a verdict; but it not being alleged in the declaration that the acts done were to the damage of the plaintiff, as ſuch reverſioner, or that his reverſionary eſtate and intereſt was thereby depreciated or leſſened in value, the defendant obtained a rule niſi to arreſt the judgment. The declaration contained only one count, and that count ſtated ſeveral acts which are ordinarily ſtated in declarations of treſpaſs as mere injuries to the poſſeſſion, viz. putting and placing upon part of a wall of the plaintiff quantities of brick and mortar, and thereby raiſing the ſame to a great height, and putting and placing pieces of timber, wood, and tiles upon the wall overhanging the ſaid yard. The plaintiff alſo added, as conſequential damage, "by reaſon whereof "not only the ſaid plaintiff during all the time aforeſaid "loſt the uſe and advantage of his ſaid part of the "wall," (that is, ſuſtained a temporary loſs affecting the occupation and enjoyment thereof merely, which he had not, not being in poſſeſſion,) "but alſo by means of the ſaid "wood, timber, and tiles ſo overhanging the ſaid wall,

(*a*) The concluding part of the declaration will be found in the judgment of the Court.

"large

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" large quantities of rain and moiſture have from time to " time during all the ſaid time run and flowed from " the top of the ſaid wall upon the yard of the plaintiff, " and the ſaid yard and the ſaid part of the wall have " been greatly injured and damnified." And the queſtion ſeems to be whether, in the abſence of any ſuch allegation as is uſually, and (I believe) invariably made in declarations of this ſort, that thereby *the plaintiff's reverſionary eſtate and intereſt in the premiſes* were damaged or prejudiced, or leſſened in value, we muſt infer that the water drip ſo deſcribed had a permanently injurious effect of this nature. It is not ſtated that the foundation of the wall was injured or undermined, or that the yard was more injured thereby as being wetted. The Count does not import in terms that any act charged upon the defendant was injurious or to the damage of the plaintiff: the declaration does indeed contain the uſual concluſion, " Wherefore the plaintiff ſaith he is injured and hath " ſuſtained damage, &c.:" but this is not matter of charge in the declaration, it is only the reſulting inference of damage drawn by the plaintiff from the matter of charge; and unleſs the count, which is the matter of charge, warrants ſuch inference, it has no effect; and in truth, although this part of the declaration was brought under our notice, but little ſtreſs was laid upon it as a ſpecial allegation of damage in the argument. The main point relied upon was this, that after verdict the Court would infer that the plaintiff was confined at the trial to the proof of ſuch an injury as would be prejudicial to the reverſion, and that all evidence ſhort of this effect muſt be ſuppoſed to have been excluded; and it was with a view to look into this point that the Court forebore giving its judgment at the time. Where a matter

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matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms as applied to the subject matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because in the extreme latitude of the terms such a sense might be affixed to them. The rule by which we must go, must be one applicable to all actions, in inferior as well as superior courts; to cases in which the judge has no power to grant a new trial as well as to those in which there is such power; and to cases in which, if the jury do not think fit to follow the judge's direction, there is no power to correct their decision: and we must take care therefore not to extend the rule (if it has not been already extended further) beyond those cases in which we must presume the judge to have given a right direction, and the jury to have followed it. In *Barber* v. *Fox*, 2 *Saund.* 136. the heir of an obligor was sued upon a promise in consideration of forbearance: he pleaded non assumpsit, and there was a verdict against him. It was then moved in arrest of judgment, because it was not alleged that the bond in this case bound the obligor's heirs.

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JACKSON *againſt* PEAKED.

heirs. It was anſwered, that the verdict had cured the objection; for if the heir was not bound, the jury ſhould have found for the defendant; and it ought therefore of neceſſity to be intended that the obligor bound his heirs: but the Court held they could not make the intendment; and the judgment was arreſted. *Hunt* v. *Swaine*, 1 *Lev.* 165. and *Sir T. Raym.* 127. are to the ſame point. In *Buxendin* v. *Sharp*, *Salk.* 662. in an action for keeping a miſchievous bull, there was no ſcienter in the declaration; and after verdict for the plaintiff, the judgment was arreſted on that account; and the Court ſaid they "could "not intend it was proved at the trial; for the plaintiff "need not prove more than is in his declaration:" and yet every lawyer is aware that a knowledge of the miſchievous nature of the animal is of the eſſence of ſuch an action, and would therefore never ſuffer a jury, if he could controul them, to find for the plaintiff in ſuch a caſe, unleſs ſuch a knowledge in the defendant were proved. In *Nerot* v. *Wallace*, 3 *Term Rep.* 25. *Buller* J. ſays, "after verdict every thing ſhall be intended which the allegations of the record require to be proved;" but do the allegations of the record in this caſe properly require an injury to the reverſion to be proved, or will they not be more juſtly and naturally ſatisfied by an injury to the poſſeſſion only? The caſe moſt favourable for the plaintiff which I have been able to meet with, is *Jenkins* v. *Turner*, *Ld. Raym.* 109.; where, upon a declaration for keeping a boar accuſtomed to bite, which had bitten a mare of the plaintiff; the allegation was that he was accuſtomed to bite "*animals*;" and it was urged, upon a motion in arreſt of judgment, founded upon the generality of this word, that thoſe animals might be frogs or ſuch animals; to which

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Powell J. anſwered, that the judge of aſſize knew well that this would not be actionable unleſs the boar had been uſed to bite horſes, ſheep, &c. and not frogs; and conſequently if that had not been proved, he would not have ſuffered the jury to have given a verdict for the plaintiff; and therefore they would intend that the evidence was of biting ſuch animal as would ſupport the action. It may be obſerved, however, upon this caſe, that it would have been a forced and unnatural conſtruction to have applied the word animals to frogs or ſuch animals, and that the ſenſe in which the Court underſtood the term is the ſenſe in which alone a judge and jury would naturally underſtand it. And *Powell* J. ſaid it might have been a queſtion in the caſe of keeping a dog, whether ad mordend. animalia conſuet. had been good, becauſe then it might have been intended more generally of animals feræ naturæ, which it is the nature of a dog to kill. As therefore there is no authority, upon which we can ſay we are warranted in preſuming that the jury were confined to ſuch injuries as would *neceſſarily prejudice* the reverſion; as the charge in the declaration is conceived in ſuch terms as to include injuries which are not neceſſarily prejudicial to it, but more aptly and naturally applied to injuries to the poſſeſſion only; and as the plaintiff has not charged that the reverſion was prejudiced, or that the plaintiff was damnified in reſpect thereof, we are not warranted in inferring that ſuch a prejudice out of the natural and ordinary ſcope of the allegation muſt have been proved; and therefore the rule for arreſting the judgment muſt be made abſolute.

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Friday, Feb. 12th.

MIDDLETON *againſt* HILL and Another.

The lien of the plaintiff's attorney upon the debt and coſts recovered in the cauſe after affirmance upon writ of error, muſt be ſatisfied before the defendants are entitled to ſet them off againſt a judgment recovered by them in another cauſe againſt the plaintiff; and coſts in error are coſts in the cauſe.

IN this caſe the defendants had recovered againſt the plaintiff a judgment for 1506*l.* upon a contract for the ſale of hemp; and afterwards the plaintiff, in a counter-action upon the ſame contract, recovered againſt them the ſum of 367*l.* 10*s.* for his damages and coſts. Judgment was entered up, and writs of error brought in both actions; and in the former the judgment being affirmed, and damages and coſts awarded to the defendants, amounting to 1580*l.* 19*s.* 3*d.*, the defendants iſſued a ca. ſa. againſt the plaintiff, indorſed to levy 1213*l.* 9*s.* 3*d.*, being the balance after deducting the ſum recovered by the plaintiff in his action againſt them; upon which ca. ſa. the plaintiff was taken in execution. Afterwards the plaintiff ſued out execution againſt the goods of the defendants for the amount of the judgment recovered by him, together with the coſts upon the affirmance of that judgment; which ſum the defendants paid into the hands of the ſheriffs of *London* under that execution. Whereupon, on a former day in this term, the defendants obtained a rule niſi for ſetting aſide the fi. fa. and reſtoring the ſum of money which they had paid under theſe circumſtances into the hands of the ſheriffs.

The Solicitor-General and *Puller* now ſhewed cauſe, and contended, 1ſt, That the defendants having taken the body of the plaintiff in execution had thereby received ſatisfaction for the whole amount of the judgment recovered

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covered by them, and therefore could not claim the benefit of any ſuppoſed deduction allowed in his favour; 2dly, that the defendants would by this mode of proceeding ouſt the plaintiff's attorney of his lien on the judgment for his coſts; and they cited *Mitchell* v. *Oldfield* (*a*), *Read* v. *Dupper* (*b*), *Randle* v. *Fuller* (*c*), and *Howell* v. *Harding* (*d*). They admitted that a different practice had prevailed in the Common Pleas, where the Court has allowed one judgment to be deducted from another, without regard to the attorney's lien, *Vaughan* v. *Davies* (*e*).

Marryat, contrà, relied upon *Vaughan* v. *Davies*, and ſaid that in *Howell* v. *Harding* this Court alſo allowed the plaintiff to ſet off interlocutory coſts payable by him to the defendant againſt the debt recovered by him on the final judgment, notwithſtanding the lien of the defendant's attorney on thoſe coſts.

Lord ELLENBOROUGH C. J. There is no caſe, I believe, in which the practice of the Common Pleas has been adopted in this court; and even there it is done by application to the Court, and not by the mere act of the parties themſelves, as in this caſe. The Court will now do what it would have done if application had been made to ſet off this judgment againſt the other; it will take care that the attorney's lien for his coſts is not defeated.

The Court made the rule abſolute for ſetting aſide the fi. fa. and reſtoring the money paid to the ſheriffs after

(*a*) 4 *T. R.* 123. (*b*) 6 *T. R.* 361. (*c*) *Ib.* 456.
(*d*) 8 *Eaſt*, 362. (*e*) 2 *H. Bl.* 440.

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MIDDLETON *against* HILL and Another.

deducting the costs of the plaintiff's attorney, upon satisfaction being entered by the defendants for the money so returned to them: and, upon *Marryat's* praying that those costs might not include the costs in error, the Court added that they thought the costs in error were costs in the cause; for the plaintiff was not in full possession of his judgment until the writ of error was determined.

Friday, Feb. 12th.

FORT and Others, Assignees, &c. *against* CATHARINE OLIVER, Administratrix, &c.

Where plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment: Held that he could not have a scire facias against his administrator; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant.

THE plaintiffs brought an action against the defendant's intestate, *Oliver*, and one *Smith*; and after proceeding to outlawry against *Smith*, went on with the action against *Oliver* alone; who died after interlocutory and before final judgment. The plaintiffs afterwards sued out a scire facias against the defendant, *Catharine*. Whereupon *Holroyd* obtained a rule nisi for setting aside the scire facias and all subsequent proceedings, for irregularity.

The Solicitor-General and *Parnther* shewed cause, and contended, that by means of the process of outlawry against *Smith*, the action became a separate action against *Oliver* alone; and, consequently, upon his death the plaintiffs were entitled by the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 6. to have a scire facias against the defendant.

But the Court held, that notwithstanding the outlawry the action continued joint; and that the remedy only

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FORT *against* OLIVER.

was ſevered by the impediment cauſed by the outlawry of going on with the ſuit againſt one of the defendants: but that did not alter the right as it originally ſtood; and in a joint action, where one of the defendants dies, as in this caſe, the proceeding muſt be againſt the ſurvivor.

Rule abſolute.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Fifty-Third Year of the Reign of GEORGE III.

HOSKINS *againſt* KNIGHT.
BASSET and Another *againſt* Same.

Wedneſday, May 5th.

The landlord of premiſes upon which the goods of his tenant are taken in execution can only claim from the party ſuing the execution the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the ſheriff in poſſeſſion.

THIS was a rule calling on the plaintiffs to ſhew cauſe why the ſheriff of *Hants* ſhould not pay to *Robert* and *William Sanders* the ſum of 90*l.* for rent due to them, out of the produce of the goods of the defendant taken and ſold under two writs of fieri facias iſſued in theſe cauſes.

The caſe was this: the ſheriff on the 11th of *June* 1812, by virtue of the ſaid writs iſſued by the plaintiffs, ſeized the household goods and other ſtock in trade upon the premiſes of the defendant, which he held as tenant at will to Meſſrs. Sanders at a yearly rent of 180*l.* A ſhort time afterwards the ſheriff ſold ſome part of the goods, but in conſequence of ſome arrangement between the plaintiffs and the defendant he retained poſſeſſion of

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the remainder until the 2d of *November* following, when they were alſo ſold.

The queſtion was, whether Meſſrs. *Sanders*, as the landlords, were entitled to demand of the plaintiffs (the parties ſuing the ſaid executions) payment of rent which accrued after the time of taking the goods in execution, and during the continuance of the ſheriff's poſſeſſion.

Burrough ſhewed cauſe againſt the rule, and relied on the expreſs words of the ſtatute 8 *Ann. c.* 14. (*a*) to ſhew that the landlord is only entitled to the rent due at the time of the ſheriff's entering into poſſeſſion, and not to rent which accrues ſubſequently during the continuance of the ſheriff in poſſeſſion.

Gaſelee, contra, contended that this being a remedial act ought to be conſtrued liberally for the benefit of the landlord, and that under ſuch a conſtruction the words "at the time of the taking ſuch goods" might be intended the time of removal; otherwiſe a ſheriff might continue in poſſeſſion of the premiſes as long as he thought fit, and the landlord would be deprived of all remedy to recover his rent during ſuch poſſeſſion.

(*a*) By 8 *Ann. c.* 14. it is enacted, that "no goods or chattels whatſoever lying or being in or upon any meſſuage, lands, or tenements which are or ſhall be leaſed for life or lives, term of years, at will or otherwiſe, ſhall be liable to be taken by virtue of any execution on any pretence whatſoever, unleſs the party at whoſe ſuit the ſaid execution is ſued out ſhall, before the removal of ſuch goods from off the premiſes, by virtue of ſuch execution or extent, pay to the landlord of the ſaid premiſes or his bailiff all ſuch ſum or ſums of money as are or ſhall be due for rent for the ſaid premiſes at the time of the taking ſuch goods or chattels by virtue of ſuch execution."

But

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But the Court held, that there was nothing which required the ſtatute to be extended beyond the literal meaning of the enacting clauſe. The words of that clauſe expreſsly pointed to the time of the taking, and ſhewed that the legiſlature contemplated one caſe only in aid of the landlord, viz. that of providing againſt the conſequence of an execution ſweeping away what is due for rent at the time when the ſeizure is made; but the ſtatute went no farther. If the ſheriff remain beyond a reaſonable time on the premiſes ſo as to injure the rights of the landlord, the latter may have his remedy by means of an action upon the caſe.

Rule diſcharged.

DOE *againſt* REYNOLDS and SAWYER, (Bail in Error.)

Wedneſday, May 5th.

Bail in error are not chargeable in an action upon the recognizance with meſne profits, where they have not been aſcertained by writ of inquiry purſuant to 16 & 17 *Car.* 2. c. 8.

THE defendants, againſt whom an action had been brought on the recognizance of bail, obtained a rule niſi for ſtaying proceedings in the ſaid action on payment to the plaintiff's attorney of the ſum of 37*l.* 10*s.* for the damages, coſts and charges in the former action of ejectment, together with the coſts of this action, to be taxed by the maſter.

The queſtion was, whether the defendants were liable in this action to a further ſum of 270*l.* 16*s.* 8*d.* for meſne profits. The declaration (as appeared by the affidavit in ſupport of the motion) ſet out the recognizance in the uſual form, which was conditioned for payment to the plaintiff, if the writ of error ſhould not be proſecuted with effect, of the damages, coſts and charges adjudged on the ſaid judgment, and alſo all ſuch coſts and charges as

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ſhould be awarded to the plaintiff for delaying the execution of the ſaid judgment by pretext of the writ of error; it then alleged that the plaintiff in error did not proſecute the writ of error, but therein failed and made default; and that in *Hilary* term 1812 it was conſidered by the Court that the plaintiff in error ſhould take nothing by her writ, but ſhould be in mercy, and the plaintiff go thereof without day; and that the plaintiff in error had not ſatisfied or paid the plaintiff the damages, coſts and charges aforeſaid adjudged upon the ſaid judgment, but the ſame remained wholly unpaid, &c.

Littledale, who oppoſed the rule, contended that the bail in error were liable for meſne profits under the breach aſſigned for non-payment of the damages, coſts and charges, &c. the caſe being expreſsly provided for by ſtat. 16 & 17 *Car.* 2. *c.* 8. *ſ.* 3 & 4. [Lord *Ellenborough* C. J. Does the ſtatute give any more than appears to be awarded upon the affirmance of the judgment in the court of error? It does not appear that that affirmance allows any thing in the ſhape of meſne profits.] The 4th ſection provides "that the court wherein execution ought to be granted upon affirmation, diſcontinuance, or non-ſuit, ſhall iſſue a writ to enquire of the meſne profits after the firſt judgment, and upon return thereof judgment ſhall be given and execution for ſuch meſne profits." It is true indeed that no ſuch writ of inquiry has been iſſued; and perhaps it will be ſaid after the action on the recognizance has been brought that it is now too late; but if that be ſo, the Court will allow this action to be diſcontinued in order to afford the means of purſuing the remedy given by the ſtatute.

Lord

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DOE *againſt* REYNOLDS and Another.

Lord ELLENBOROUGH C. J. The plaintiff is not without remedy, but may ſtill reſort to the defendant in the original action for the recovery of the meſne profits. He had an opportunity of charging the bail with them; but if he has let that opportunity ſlip, I do not ſee that he is particularly intitled to indulgence as againſt the bail. The Court muſt look to the record as it now ſtands. The bail are charged in a particular manner, and the plaintiff, if he is too late to charge them in any other, muſt be content with reſorting to the principal. I ſee no reaſon however why he ſhould not be permitted to diſcontinue, although perhaps there may be a difficulty in aſſigning ſuch a breach as will comprehend the meſne profits when aſcertained under the ſtatute; but I am not prepared to decide upon that queſtion: at all events it will be an expenſive mode of proceeding.

The Court allowed *Littledale* time to conſider whether he would diſcontinue.

Marryat was in ſupport of the rule.

LUCAS and Others *againſt* DE LA COUR.

Thurſday, May 6th.

ACTION on the caſe. The plaintiffs were partners, and declared that they were poſſeſſed of a large quantity of Carthagena bark, which was on board a certain ſhip in the river *Thames*, bound for a certain port, and that the defendant agreed with them to take charge of the ſaid bark upon certain conditions ſpecified in the

Where a contract was made by one of ſeveral partners in his individual capacity, who at the time declared that the ſubject matter of the contract was his property alone:

Held that his declaration was evidence againſt all the partners, and therefore they could not ſue jointly upon ſuch a contract.

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LUCAS and Others *againſt* DE LA COUR.

declaration. The 2d count ſtated, that in conſideration that the plaintiffs had retained and employed the defendant to cauſe certain quantities of bark of the plaintiffs to be ſold on their account on a certain commiſſion, &c., the defendant undertook to render them a reaſonable account, &c. There were alſo the money counts. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt term, the plaintiffs were nonſuited upon the following evidence. In order to prove the defendant's handwriting to the agreement ſtated in the declaration, which agreement was made with one of the plaintiffs only of the name of *Moravia*, the plaintiffs called the clerk of the defendant, who upon croſs-examination ſtated that he had had converſations with *Moravia* on the ſubject of the contract; that he had heard him ſay upon all occaſions that the bark was his property, and belonged to no other, and had been allotted to him out of the partnerſhip ſtock; and that he offered the defendant to become a partner with him in the ſale of it.

Topping now moved to ſet aſide the nonſuit on the ground that the bark muſt be taken to be the joint property of all the partners, notwithſtanding the evidence of what paſſed in converſation with *Moravia*; it being not competent to one partner, to defeat the title of his copartners to any portion of the joint property, by a declaration that ſuch portion belonged to himſelf alone.

Lord ELLENBOROUGH C. J. It ſtruck me at the trial that without conſidering this as evidence that the property belonged to *Moravia* alone, yet if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they muſt

must be content to do so according to the mode in which the contract was made. 1813.

LUCAS and Others *against* DE LA COUR.

BAYLEY J. The declaration of *Moravia* was certainly evidence against the plaintiffs.

Per Curiam, Rule refused.

LEONARD *against* BAKER.

Thursday, May 6th.

TROVER for goods taken in execution by the defendant (sheriff of *Worcestershire*) upon a judgment obtained in *Michaelmas* term last by one *Collins* against *John Clee*.

Where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of such assignment was advertised in the newspaper, and the goods were afterwards sold by the trustees at public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession: Held that such purchase by the plaintiff would protect the goods against a judgment afterwards obtained and execution levied by a creditor of the husband, who had notice of the assignment at the time; although the plaintiff permitted his mother to continue in possession: and therefore he was entitled to recover them from the sheriff.

At the trial before *Bayley* J. at the last assizes for the county of *Worcester*, it appeared that *Clee* was a carpenter and resided in a house at *Pershore* with his wife, who let lodgings. The plaintiff was the son of *Clee*'s wife by a former husband. On the 17th of *January* 1812, *Clee* being then insolvent, by bill of sale (to which *Collins* was not a party) assigned all his effects to two of his creditors in trust for themselves and the rest of the creditors; and shortly afterwards absconded, leaving his wife in possession. Within two or three days after the execution of the assignment, a person from the trustees came upon the premises and took away a saw; and a man was put into possession of the goods on behalf as well of the trustees as of the landlord of the house, who had distrained for rent before the assignment. On the 23d of *January* the assignment was advertised in the *Worcester* paper, and it was notorious at *Pershore* that *Clee* had executed it;

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and *Collins*, who reſided a few miles off, was alſo informed of it, and then ſaid he would conſider, whether he would come in under the deed or not. On the 12th of *February* the ſtock in trade was ſold by auction on behalf of the truſtees; when the plaintiff, in order to accommodate his mother, became the purchaſer of the houſehold goods; which were fairly appraiſed to him, and he paid the price of them, and in a few days afterwards removed ſome articles, but ſuffered the greater part to remain in the houſe with his mother, who continued to reſide there and take in lodgers as before; and at the enſuing *Michaelmas* he alſo took the houſe of the landlord at an advanced rent. The execution was levied in the *December* following; when the plaintiff gave notice to the ſheriff that the goods were his property under the appraiſement and ſale; which was the firſt time that *Collins* was appriſed of that circumſtance. The learned Judge left it to the jury to conſider, 1ſt, whether the change of property by the aſſignment and ſubſequent ſale made to the plaintiff was notorious at *Perſbore*; upon which the jury found in the affirmative: and 2dly, whether the aſſignment had been executed with an intent to defeat either the general body of creditors or any particular creditor. The jury found in the negative; whereupon a verdict was entered for the plaintiff.

Jervis moved to ſet aſide the verdict, and enter a nonſuit, on the ground that it was improperly left to the jury to ſay, whether the change of property was notorious, there being no evidence of any change of property at all; inaſmuch as *Clee*'s wife was ſuffered to continue in poſſeſſion of the goods after the aſſignment to the truſtees, and after the ſale to the plaintiff, preciſely in the ſame manner as before.

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No exclusive possession had been taken by the trustees under the deed; for the person who was sent in two or three days after, was acting as well for the landlord as for the trustees; and although the assignment was made public to the world, yet, if the party assigning still continues in possession, it is fraudulent. In like manner, after the sale to the plaintiff the possession remained as before; and even supposing the sale to him to have amounted to a change of property, it could only operate as a gift to the mother, and then the property would pass to the husband and be liable to his debts. [*Le Blanc* J. There was no evidence that it was a gift. *Bayley* J. It was not put at the trial as a gift; the only question made was whether the property passed.]

Lord ELLENBOROUGH C. J. I think the verdict is according to the law and the facts, as they appeared before the jury. To be sure the evidence was strong to repel the presumption of its being a gift to the mother, supposing that point had been made at the trial; for such a presumption would have defeated the very object for which the purchase was made, by vesting the property in the husband, and thereby rendering it subject to his debts. As to the point respecting the change of property; what was done respecting it was not done secretly, but the trust-deed was known and advertised in the public papers; and the sale under it was by public auction. The trustees, indeed, for a time, allow the wife to continue in possession after the assignment; and do not themselves interfere with the goods by removing them, except on occasion of the man's coming in and taking away the saw; which, however, is a circumstance in the case, although I do not much rely upon it:

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it: but when the ſale took place, the plaintiff removed a part of the goods, and the reſt only he ſuffered to remain with his mother for her accommodation. At all events an effectual change took place in *September*, when the houſe was retaken by the plaintiff, at an advanced rent; but it ſeems to me there was a bonâ fide change before that time: to hold otherwiſe would be to pronounce that a perſon could not make a bonâ fide purchaſe of goods in the poſſeſſion of another for his accommodation, and for the purpoſe of continuing them in the ſame poſſeſſion.

LE BLANC J. *Clee* abſconded, and never returned except on *Sundays*. The plaintiff purchaſed for the benefit of his mother. It does not therefore ſtrike me that if the queſtion had been raiſed at the trial, the jury would have found it a gift to the mother; becauſe the tranſaction was intended to protect the goods for her uſe, and not to ſubject them to the incumbrances of the huſband. As to the change of poſſeſſion; part of the goods ſold to the plaintiff was removed by him, and he afterwards took the houſe of the landlord at an advanced rent. Under theſe circumſtances it appears to me that the deed was not fraudulent as againſt the creditor who had notice.

BAYLEY J. The poſſeſſion did not give to *Clee* any falſe credit in the neighbourhood. The tranſaction as to the aſſignment was perfectly notorious, and *Collins* had notice of it; and I think it is impoſſible to ſay that the poſſeſſion of the goods was left with the mother in ſuch a way as to be fraudulent on the part of the plaintiff. It was notorious in the neighbourhood that a part

part of the goods was ſold to the plaintiff, and ſome of them removed, and that the reſt were only left in the poſſeſſion of the mother for her accommodation.

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Rule refuſed (*a*).

(*a*) See 2 *Boſ. & Pull.* 59., *Kidd* v. *Rawlinſon.*

THOMAS BIGNOLD and JOHN COCKSEDGE BIGNOLD *againſt* WILLIAM WATERHOUSE, JOHN WATERHOUSE, SAMUEL WATERHOUSE, JOHN WATSON, and THOMAS COLDWELL.

Thurſday, May 6th.

CASE againſt the defendants, proprietors of the *Norwich* coach, for the loſs of a parcel containing bank notes and bills delivered to the defendants to be carried from *Norwich* to *London*, and there delivered to Meſſrs. *Fraſer* and Co., bankers.

Where it was agreed between the plaintiff and one of the defendants, proprietors of a ſtage coach, to carry certain parcels for the plaintiff free of expence, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unleſs entered and paid for, &c. Held, that the defendants were not liable for the loſs of a parcel of above the value of 5*l.*, ſent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants.

At the trial before *Bayley* J., at the *London* ſittings, after laſt *Michaelmas* term, it appeared that the plaintiffs were bankers reſiding at *Norwich*, and the defendants proprietors of the mail coach from *Norwich* to *London*. Early in the year 1810, a perſon who was one of the proprietors of another coach, called the old *Norwich* coach, intending to relinquiſh a part of his intereſt in that concern, and having promiſed the refuſal to the plaintiff *T. Bignold*, the defendant *Coldwell* propoſed to *T. Bignold* that if he would give up his claim to that promiſe, his own family and private parcels ſhould go free by the mail coach; to which propoſal *T. Bignold* after ſome time acceded. From that time parcels were

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sent two or three times a week by the plaintiffs to their correspondents in *London*, free of expence, except for booking and porterage; upon which parcels the plaintiffs usually wrote the word "banking;" but it being suggested by *Coldwell* that it might operate as a temptation, and occasion the loss of the parcels, it was omitted, and the word "carriage" was written instead; to which *Coldwell* who was the book-keeper at *Norwich*, or his son, generally added the word "free," and subscribed their initials. On the 3d of *Jan.* 1812, the parcel in question, addressed to *Fraser* and Co., *Cornhill*, *London*, marked "carriage," and containing bills and notes to a considerable amount, was taken to the coach office in *Norwich*, by one of the plaintiffs' clerks, who delivered it to *Coldwell*, and paid for the booking. It was put into the coach by a servant of the defendants, and arrived safe in *London*; but was lost out of the cart by the boy who was employed to carry it from the inn in *London*, to the bankers. The usual notice given by carriers was affixed in the defendants' coach office at *Norwich*, viz., that they would not be accountable for any parcel above the value of 5*l.*, unless the same was entered and paid for accordingly. At the time of the delivery of the parcel in question *Wm. Waterhouse* lived in *London*, *John Waterhouse* at *Ipswich*, and *Watson* and *Coldwell* at *Norwich*. No charge had ever been made for the banking parcels; but *T. Bignold*, who was secretary to the *Norwich* fire and life insurance offices, had frequently sent insurance parcels by this coach, and these had been regularly charged. The learned Judge was of opinion that under the terms of the notice published by the defendants, it was incumbent on the plaintiffs to have entered the parcel in question with the defendants

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defendants as a parcel above the value of 5*l.*; for that even admitting the evidence proved that the defendants had agreed to carry this parcel gratuitouſly, ſo as to exempt the plaintiffs from paying for it as a parcel above that value, ſtill the defendants were entitled to have had notice of its value, in order that their attention might be called to it more particularly; and that there were not any circumſtances in the caſe, from which it muſt be neceſſarily implied that they had notice that it was a parcel of value. On theſe grounds he directed a nonſuit.

In *Hilary* term *Park* obtained a rule niſi for ſetting aſide the nonſuit, upon the ground that the notice required by the defendants did not apply in any reſpect to a gratuitous conveyance; and if it did, that it muſt be inferred as well from the mode in which theſe parcels had been conveyed, as from the ſubſtitution of the word "carriage" for "banking," at the ſuggeſtion of the defendants, that they had notice of the value.

The Attorney-General and *Abbott* now ſhewed cauſe, and contended that this was only a perſonal agreement with *Coldwell*, made behind the backs of the other defendants, for his individual benefit, and would not bind thoſe who were not privy to it. The defendants therefore, with reſpect to this parcel, were to be conſidered as ſtanding in the ſame ſituation as they ſtand with reſpect to all other parcels delivered to them in the ordinary courſe of their buſineſs; and conſequently were exempted from liability by the expreſs terms of their notice, the parcel not having been paid for as above the value of 5*l.* But admitting the agreement to be

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binding on all the defendants, ſtill it is only an agreement to receive and carry the parcels free of expence; but not to wave the benefit of notice of their value: if it were to be conſtrued to ſuch an extent it would make the liability ariſing from an agreement to carry without reward greater than where a reward is to be taken, which would be contrary to the doctrine held in *Coggs* v. *Bernard* (*a*).

Park and *Peake*, contrà. The agreement with *Coldwell* muſt be preſumed to have been communicated to and adopted by all the defendants, from the circumſtance of the banking parcels having been uniformly carried free for two years; and there can be no doubt that if that had been made a queſtion at the trial, the jury would have ſo found. Perhaps alſo from the ſame circumſtance coupled with that of the alteration made in the indorſement of the parcels, they might have inferred that the defendants had notice of the value, ſuppoſing any notice to have been neceſſary. But none whatever was neceſſary; becauſe the notice required by the defendants, as publiſhed at their office, was meant only to apply to parcels delivered to them for carriage in the uſual courſe of their trade, and not under a ſpecial agreement like the preſent: and as the requiring ſuch notices has always been conſidered as a ſpecial exception to the general liability of carriers, it ought not to be extended beyond the purpoſe for which it was intended. This caſe does not fall within the doctrine of *Coggs* v. *Bernard*, becauſe this is not an agreement to carry without reward; for although the reward was not paid at the time of the delivery of each parcel, ſtill there was

(*a*) 2 *Ld. Raym.*, 917, 918.

a con-

a conſideration for the agreement, which is equivalent to a reward.

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Lord ELLENBOROUGH C. J. It appears to me in this caſe that there was not any contract with the defendants, conſtituted in ſuch manner as to bind more than one of them. There was indeed a contract, and a fraudulent one, between *T. Bignold* and *Coldwell*, which was unknown to the other defendants, to carry the family and private parcels of *Bignold* free of carriage, for a conſideration moving to *Coldwell* alone. Without conſidering whether the parcel in queſtion was within the deſcription of family or private parcels, how can it be ſaid that all the defendants undertook to carry this parcel ſafely and ſecurely? It was delivered to the defendants for the purpoſe of carriage, but not for a reward to all the partners; but for a reward which was to be intercepted by one only. It is a general rule indeed that where ſeveral are concerned together in partnerſhip, notice to one is equivalent to notice to all; but that rule preſumes that the tranſaction is bonâ fide. Here, however, the caſe is different, the agreement is made with one of the defendants for his individual benefit alone, and the others are not parties concerned, not being made privy to the agreement. It was incumbent therefore on the plaintiffs to ſhew that notice was given to the other partners. I do not rely on the argument that this was a bailment for the conveyance of the parcel without reward, and therefore the bailee reſponſible only for perſonal negligence; but the ground I take is this, that there was no contract at all between the plaintiffs and the defendants: in which caſe non oritur actio. This deciſion will not be concluſive

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concluſive againſt the plaintiffs if they can ſhape their action in any other form.

GROSE J. agreed.

LE BLANC J. I think in every view of this caſe the action is not maintainable. The defendants are proprietors of a coach, and had given the uſual notice that they would not be accountable for the loſs of any parcel of above the value of 5*l.*, unleſs entered and paid for accordingly. On the general rule therefore they would not be liable unleſs they had notice of the value. But it is ſaid that this caſe is taken out of the general rule by the particular circumſtances. Thoſe circumſtances are, that in 1810 an agreement was entered into between *T. Bignold* and *Coldwell*, one of the proprietors of this coach, by which, in conſideration of *Bignold*'s tranſferring to *Coldwell* his right to a ſhare in another concern, the latter agreed to carry his (*Bignold*'s) family and private parcels free of expence. There was no conſideration ſubſiſting between *Bignold* and the other proprietors, but only between *Bignold* and *Coldwell*. Then if we conſider what was to be carried under the terms of this agreement. They were to be family and private parcels; but this parcel is neither one nor the other; and therefore not within the terms of the agreement, even ſuppoſing *Coldwell* to repreſent all the proprietors. But it is ſaid that 23 parcels of this deſcription had been carried free for two years, therefore it muſt be inferred that all the partners knew of it and acquieſced. But it appears that during that time *Coldwell* was bookkeeper, and the parcels were tranſmitted by him, and he

he was acting for his own benefit without communicating with the others. In every view of the case therefore I think there is no reason for disturbing the nonsuit.

BAYLEY J. The object of requiring notice in these cases is twofold; first, to obtain a larger premium for the conveyance of valuable parcels; and secondly, to put the proprietors on their guard; and therefore I think that where such notice as the present is required to be given, even in a case where a carrier undertakes to convey goods without reward, if the goods exceed the value limited, notice ought to be given, in order to direct his attention to the particular goods; for he does not dispense with notice in toto, but only with payment. Here there was no evidence that any notice had been given as to this being a parcel of value. If I had been desired to leave it to the jury whether the defendants knew this to be of value, I should certainly have left that question to them.

Rule discharged.

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The KING *againſt* The Collector and Comptroller of the Cuſtoms in LONDON.

The purchaſer of a ſhip which appears by the ſentence of condemnation in the vice-admiralty court abroad to have been taken and condemned for being engaged in the ſlave trade, is not entitled to regiſter ſuch ſhip at the cuſtom-houſe under the 26 *G.* 3. *c.* 60., as the owner of a ſhip taken and condemned as lawful prize, although he produce a certificate from the Judge of the court abroad certifying that the ſhip was condemned as lawful prize.

THIS came on upon a rule niſi obtained in the laſt term for a mandamus to the collector and comptroller of the cuſtoms, commanding them to regiſter the ſhip *Merced*, and to grant a certificate of ſuch regiſtry, purſuant to the ſtat. 26 *G.* 3. *c.* 60. (*a*). The rule was obtained on behalf of the purchaſers of the ſaid ſhip, who, it was contended, had exhibited at the cuſtom-houſe the proper documents required by the act to entitle them to regiſtry. The document upon which the queſtion turned was a certificate from the judge of the vice-admiralty court at *Sierra Leone*, certifying, "that it appeared by the records of the ſaid court that "the ſhip *Merced* was condemned in the ſaid court *as* "*good and lawful prize* to our ſovereign lord the king, "ſeized and taken by his majeſty's garriſon at *Senegal*." To obviate the effect of this certificate, a copy of the decretal part of the ſentence of condemnation, tranſmitted by the regiſtrar of the court at *Sierra Leone* to the

(*a*) By *ſ.* 3. it is enacted, that all and every ſhip and veſſel having a deck, or being of the burthen of 15 tons or upwards, belonging to any of his majeſty's ſubjects, &c. ſhall be regiſtered in manner thereinafter mentioned, and that the perſon or perſons claiming property therein ſhall cauſe the ſame to be regiſtered, and ſhall obtain a certificate of ſuch regiſtry from the collector and comptroller of his majeſty's cuſtoms, &c.: and by *ſ.* 25. it is further enacted, that the owner or owners of all ſuch ſhips or veſſels as ſhall be taken by any of his majeſty's ſhips or veſſels of war, or by any private or other ſhip or veſſel, and condemned as *lawful prize* in any court of admiralty, ſhall upon regiſtering ſuch ſhip or veſſel before he or they ſhall obtain ſuch certificate, produce to the proper officer of his majeſty's cuſtoms a certificate of the condemnation of ſuch ſhip or veſſel under the hand and ſeal of the Judge of the court in which ſuch ſhip or veſſel ſhall have been condemned, &c.

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regiſtrar of the high court of admiralty, was ſet forth in an affidavit in anſwer to the rule, (and it was admitted on the other ſide that it was a true copy of that part of the ſentence,) which recited "that the ſaid ſhip was at "the time of the ſeizure thereof on the high ſeas un- "lawfully equipt and refitted, as had been ſet forth "againſt her by the claimant," and proceeded "there- "fore to pronounce, decree, and declare that the ſaid "ſhip, her boats, guns, tackle, apparel, and furniture, "were rightly and duly taken and ſeized, and that the "ſaid ſhip was at the time of the ſeizure thereof on the "high ſeas, as far as appears to the Court, illegally "equipt or refitted, in that the ſaid ſhip being fitted "out, manned, and employed for the proſecuting or "carrying on the *African* ſlave trade, did procure and "receive from a ſubject of his majeſty reſident at "*Goree*, certain goods, wares, or merchandize, fit and "neceſſary to the proſecuting and carrying on the ſaid "trade, againſt the form of the ſtatutes in that caſe "made and provided; and that the ſaid ſhip being ſo "unlawfully equipt and refitted as ſuch, ought to be "accounted and reputed liable to confiſcation, and to "be adjudged and condemned as good and lawful prize "to our lord the king; and that the ſaid ſhip, her boats, "guns, tackle, apparel, and furniture, be adjudged and "condemned as good and lawful prize to our lord the "king, ſeized and taken by his majeſty's garriſon of "*Senegal*," &c.

The Attorney-General and *Dampier* ſhewed cauſe againſt the rule, and contended that the Court ought not to interfere in a caſe where, notwithſtanding the certificate of the Judge of the vice-admiralty court abroad, certify-

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ing that the ship was condemned as lawful prize, it appeared from the sentence of condemnation itself that she was condemned on account of a breach of the laws prohibiting the slave trade; which made her liable to *confiscation* (*a*), and not properly the object of condemnation as *prize* within the meaning of the registry acts. The vice-admiralty court abroad cannot, by introducing an incorrect term into their certificate, convert that which is only a confiscation into a condemnation as prize; and if so, this certificate, when it comes to be explained by the sentence, amounts to no more than a confiscation. The parties, therefore, applying for this mandamus have not and are not in a condition to produce the proper document required by the act to entitle them to demand registry.

Park and *Brougham*, contrà, maintained, 1st, that the collector and comptroller of the customs acted ministerially and not judicially in granting registry, and therefore could not look beyond the terms of the certificate into other documents in order to judge of its legal effect. But, 2dly, supposing they could, they were not right in refusing registration in this case; because the parties applying had produced such a document as satisfied the meaning of the registry acts. The several acts which relate to the registry of ships taken and condemned (*b*), do indeed speak of them as *prize* ships; but that expression is not necessarily to be taken in its strict sense to mean prize of war only, but may also mean all such seizures as are made upon good cause of condemnation.

(*a*) 46 G. 3. c. 52.

(*b*) 26 G. 3. c. 60. *s.* 25. 43 G. 3. c. 160. *s.* 4. 45 G. 3. c. 72. *s.* 29.

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And this conſtruction ſeems favoured by 26 *G.* 3. *c.* 60. *ſ.* 25. (upon which this application is founded), which ſpeaks of "all ſuch ſhips as ſhall be taken by any of "his majeſty's ſhips of war, or by any private or other ſhip," not adding *ſhip of war*, which muſt be intended therefore to comprehend other than mere hoſtile captures. And a ſubject of a friendly power may be guilty of ſuch acts of trading as to become liable to a ſeizure and condemnation of his property as prize in a general ſenſe, and yet not as prize of war (*a*). Every prize therefore is not neceſſarily prize of war; and the true conſtruction of the word prize in theſe acts ſeems to be this, that it extends to all ſhips condemned as ſuch by the prize courts. But even if it is to be taken in its ſtrict ſenſe, it may be inferred from what fell from Sir *W. Grant* in the caſe of the *Amedie* (*b*), where he held the trading in ſlaves as primâ facie an offence againſt the law of nations, that in the court of appeals at leaſt this would be conſidered as a hoſtile capture. At all events the parties making this application are the innocent purchaſers under a condemnation as prize, and therefore entitled to the moſt favourable conſtruction.

Lord ELLENBOROUGH C. J. If the trading in ſlaves be an offence againſt the law of nations, it does not therefore follow that it is an offence that would make the veſſel ſubject to hoſtile capture. It would not of itſelf convert the trader into an enemy; and therefore the authority of the caſe cited does not govern the preſent. The authority given by the ſtatute to regiſter ſhips taken and condemned, extends only to ſhips taken and con-

(*a*) 1 *Rob. Adm. R.* 210. *Caſe of the Benigheid.* 4 *Ib.* 251. *The Neyade.*
(*b*) 1 *Acton's R.* 251.

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demned as lawful prize. I have no conception at preſent that the ſtatute meant to include any other than prize of war; but if it were doubtful whether its proviſions ſhould be extended to condemnations incurred on account of the violation of a great political law of the ſtate, I am ſure that the Court would expect the parties who call for its extraordinary interpoſition, and upon whom the onus lies, to remove thoſe doubts before they acceded to the application. As the caſe now ſtands, the certificate appears to have been irregularly granted; and the queſtion is whether we are to act upon a document ſo granted. We cannot reaſon as to what it might have been expedient for the legiſlature to enact; they might, if it had ſeemed good to them, have allowed all ſhips, for whatever cauſe they were condemned, after purchaſe by a *Britiſh* ſubject, to have the benefit of regiſtration; but they have not ſo enacted, but have limited the regiſtry to ſhips condemned as prize; and it does not become me to ſay that where a limited authority is given by the legiſlature, that authority may be extended: and I think that to grant this rule would in effect be extending that authority.

GROSE J. The words condemned as lawful prize apply only to veſſels taken jure belli, and not as in this caſe to a veſſel condemned for violating the proviſions of an act of parliament.

LE BLANC J. The queſtion is whether upon the diſcloſure now made, from the papers before the Court, of the real nature of the tranſaction, we are authoriſed to grant a mandamus to the collector and comptroller of the cuſtoms to regiſter this ſhip. The act ſays that

" no

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"no ship or vessel foreign built (except such ships or vessels as have been or shall hereafter be taken by any of his majesty's ships or vessels of war, or by any private or other ship or vessel, and condemned as lawful prize in any court of admiralty,) shall be entitled to the privileges of a *British* ship," &c. It is in this respect a restraining not an enlarging statute; and the question is whether this ship be within the exception. Now it appears by the sentence that she was taken as being employed in carrying on the *African* slave trade, in violation of the laws of this country, and condemned on that account. But it is said that by the certificate of condemnation required by *s.* 25. it appears she was condemned as lawful prize, and that is sufficient. But the act does not make the certificate of the Judge final and complete evidence of the cause of condemnation of the ship; and if this Court see that she was condemned for a breach of a revenue law, they will not give such a conclusive effect to the certificate as to shut out from their view the real cause of her condemnation: and I believe it has not yet been decided that a ship, for violating a revenue law, is the object of condemnation as lawful prize. This ship therefore is clearly not brought within the exception in the registry act, and we should be doing injustice in compelling the commissioners to grant registry.

Per Curiam, Rule discharged.

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Thurſday, May 6th.

The KING, on the Proſecution of Sir ARTHUR CHICHESTER, *againſt* INCLEDON.

The proſecutor of an indictment for obſtructing a highway, muſt ſhew himſelf to be the party grieved in order to obtain coſts under the 5 & 6 *W.* & *M. c.* 11. *ſ.* 3.: therefore where the proſecutor did not apply for the coſts until two years after judgment given, and it did not appear that he had ever uſed the highway before it was ſtopped, and whilſt it was ſtopped declared he did not care about it: held that he was not entitled to coſts as the party grieved, although the proſecution was at his inſtance and expence.

IN *April* 1809 the defendant was indicted at the quarter ſeſſions for the county of *Devon* for obſtructing a public road, which indictment was removed by certiorari at his inſtance, and tried at the *Lent* aſſizes 1810, and a verdict found for the crown. Judgment was given in the following *Michaelmas* term, and the defendant fined 6*s.* 8*d.* and his recognizance diſcharged. In *Michaelmas* term laſt a ſide bar rule having been obtained for taxing the coſts to be paid by the defendant to the proſecutor; *Harris* in the following term obtained a rule niſi for diſcharging that rule, on the ground that Sir *A. Chicheſter* was neither the proſecutor nor party grieved within the meaning of ſtat. 5 & 6 *W.* & *M. c.* 11. *ſ.* 3.; in ſupport of which the affidavits ſtated, that the defendant about 18 years ago, at which time Sir *A. Chicheſter* was an infant, purchaſed the property through which the road in queſtion paſſed, which had been ſhut up ever ſince the purchaſe until the indictment was preferred. That before that time Sir *A. Chicheſter* never uſed the road in queſtion. That on the death of Sir *John Chicheſter*, his immediate anceſtor, in *Sept.* 1808, a ſhort time before the indictment was preferred, Sir *Arthur* became poſſeſſed of his property. Application was then made by his ſteward to the defendant to open the road, which he declined doing, until the right was tried; in the mean time, however, he gave permiſſion to Sir *Arthur* or his ſervants to paſs through that part of his eſtate. That in a converſation between Sir *Arthur* and the defendant, he told the defendant that he knew nothing about the road; that he

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was a young man juſt come to his eſtate; that his attorney had told him he had a right to the road, and that he ought to maintain his right, but as to himſelf he did not care about it. That ſince the road had been declared to be a public road and thrown open, neither Sir *Arthur* nor his ſervants had ever uſed it; and that it never could have been advantageous to him to uſe it, as there were better and more commodious roads for the enjoyment of his eſtate. It was ſtated alſo, that ſoon after Sir *Arthur* came to his eſtate an auction was held for the ſale of ſome timber in the woods belonging to him: that one of the conditions of ſale was, that the timber ſhould be conveyed over the road in queſtion; but ſeveral of the bidders declared that as there were other more commodious and convenient roads than that, they would not bid at ſuch auction until that condition was withdrawn. It was alſo ſworn, that the opening this road would probably be detrimental to the eſtate of Sir *Arthur*, by ſubjecting the ſame to conſiderable treſpaſſes. The name of Sir *A. C.* did not appear on the back of the indictment. The rule was oppoſed upon the following grounds as diſcloſed by affidavit: that for ſeveral years previous to the obſtruction by the defendant the road in queſtion had been uſed as a public road; that it was more convenient than the other roads from Sir *A. Chicheſter's* woods, being nearly on level ground, whereas the other roads paſſed over high and ſteep hills. It was admitted, however, that the road had not been uſed ſince it was thrown open, in conſequence of the proſecution; but that was accounted for by its not being in a proper ſtate of repair. It was further ſtated, that on the 20th of *March* 1809 ſeveral perſons were employed in conveying materials to repair a weir of Sir *Arthur*, and that they were obliged

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to go a circuitous route in consequence of the obstruction in this road; whereby Sir *Arthur* was put to an additional expence, the workmen being paid by the day. The attorney for Sir *Arthur* swore that the defendant had been indicted at the sole instance and expence of Sir *Arthur*; but there was not any affidavit by Sir *Arthur* himself.

Casberd, who shewed cause, contended that it sufficiently appeared under these circumstances that Sir *A. Chichester* was both prosecutor and party grieved, so as to entitle him to the costs. With respect to his being the prosecutor, it appears that the prosecution was carried on at his instance and expence; and the circumstance of his name not appearing on the back of the indictment will not prevent his being so considered, according to the opinion of *Buller* J. in *Rex* v. *Sharpness* (*a*). As to his being the party grieved, that was shewn by his being obliged to take a circuitous route and incur additional expence in consequence of the obstruction (*b*).

Jekyll and *Harris* contrà, did not rely on the name not appearing on the back of the indictment; but contended that, after a lapse of two years from the time when judgment was pronounced and the recognizance of the defendant discharged, the party who came to the court for costs was bound to shew himself clearly within the statute. That has not been done in this instance; for it is only left to be inferred that he is the prosecutor from the prosecution having been instituted at his instance and expence: and even that fact is not sworn to by the party

(*a*) 2 *T. R.* 48. (*b*) 7 *T. R.* 32. *Rex* v. *Williamson.*

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himſelf, which it ought to have been, but by his attorney only. Then there is no peculiar grievance ſtated as ariſing to him any more than to any other individual who might chance to be prevented going that way, viz. that he was obliged to go another. Beſides, there is no caſe where the Court has allowed coſts after the recognizance has been diſcharged; and in *Rex* v. *Sharpneſs*, *Buller* J. ſaid that this act of parliament had always been conſtrued as ſtrictly as poſſible.

Lord ELLENBOROUGH C. J. The queſtion is, whether Sir *A. Chicheſter* is the proſecutor of this indictment; and if ſo, whether he is the party grieved. Under the circumſtances of this caſe, conſidering that he was a minor when the obſtruction firſt commenced, that his name was not on the back of the indictment, and that he was only ſo far a party to the proſecution inaſmuch as he defrayed the expences; conſidering alſo that the application for coſts has been delayed for two years beyond the time when it would more properly have come before us, it might have been fitting that Sir *A. Chicheſter* ſhould have come forward himſelf and depoſed to the fact of his being the proſecutor; although I own the inclination of my opinion upon this point is, that he ſtood in the ſituation of proſecutor. But then the queſtion ſtill remains, whether he is the party grieved. The endeavour of Sir *A. Chicheſter* to have the timber conveyed along the road in queſtion, was rather the act of a party grieving than of one aggrieved; for it appears not to have been approved of by any of the bidders, and was probably planned with a different view than that of their accommodation. I admit indeed that with reſpect to the public there has been an uſurpation by the defendant; but that is not enough

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enough to conſtitute a proſecutor the party grieved; there muſt be alſo ſome ſpecial and peculiar injury accruing to him from the obſtruction, beſides that which affects all the ſubjects in common with him. The act of parliament applies as well to indictments for riots, forcible entry, aſſault and battery, and other miſdemeanors, as to an indictment in this form; in many of which the offence itſelf is of a perſonal and private nature, although in its conſequences it concerns the public, and is therefore the object of public proſecution. In thoſe caſes the offence itſelf deſignates the party grieved; but in this there is nothing in its nature which preſſes more upon one individual than another. Then looking to theſe affidavits, I am anxious to find ſome peculiar grievance ſtated prior to the indictment to ſatisfy me that the party is within the meaning of this act the party grieved; but I am unable ſo to find: and the proſecutor ſeems for a long time to have ſo conſidered it; for he lies by for two years after the judgment pronounced before he makes this application. Under theſe circumſtances therefore I think the Court exerciſes a ſound diſcretion in directing that the rule for diſcharging the ſide bar rule muſt be made abſolute.

GROSE J. It does not appear from the affidavits that Sir *A. Chicheſter* ever conſidered himſelf the party grieved originally; what the attorney might have done I cannot ſay. The caſe is not brought within the act of parliament.

Per Curiam, Rule abſolute (*a*).

(*a*) See 16 *Eaſt*, 194. *R.* v. *Dewſnap*.

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The KING *againſt* CREEVEY, Eſq. M. P.

Friday, May 7th.

A member of the Houſe of Commons may be convicted upon an indictment for a libel in publiſhing in a newſpaper the report of a ſpeech delivered by him in that Houſe, if it contain libellous matter, although the publication be a correct report of ſuch ſpeech, and be made in conſequence of an incorrect publication having appeared in that and other newſpapers.

THE defendant was tried at the laſt aſſizes for the county palatine of *Lancaſter*, before *Le Blanc* J., for a libel againſt *Robert Kirkpatrick*. The indictment charged that the defendant intending to excite diſcontent and diſaffection in the liege ſubjects againſt the adminiſtration of the government in the collection of the revenue, and to traduce and vilify *Kirkpatrick*, being an inſpector general of taxes at *Liverpool*, appointed under 48 *G.* 3. *c.* 141. and to bring him into hatred, &c. in the execution of his duty as ſuch inſpector, &c. did print and publiſh a malicious libel of and concerning him being ſuch inſpector, and his conduct in the execution of his office, in the form of a report of a ſpeech purporting to have been made by the defendant in the Houſe of Commons, containing, amongſt other things, &c. The libel was then ſet forth, and imputed to *Kirkpatrick* that he was to be an informer or accuſer againſt his neighbours and fellow townſmen, for having their lands aſſeſſed below their real value; and that a great annuity was to be his recompence, for undertaking to ſcrew up their aſſeſſments to the extent of his own imagination; and that this had been carried into effect. At the trial it appeared that the paſſages which conſtituted the ſubject of the charge, were contained in a ſpeech delivered by the defendant, who was a member of the Houſe of Commons, in his place in that Houſe upon a debate reſpecting the *Eaſt India* Company's affairs. An incorrect report of what he had there ſaid having appeared in the *Liverpool* and other newſpapers, the defendant ſent what was admitted by the counſel for the proſecution

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to be a correct report of his speech, to the editor of the *Liverpool* paper, with a request that he would publish it in his newspaper; which he accordingly did. Upon this evidence the counsel for the defendant submitted to the learned Judge that there was no question to go to the jury. 1st, There was not any proof of malice so as to constitute the publication libellous on that account: and, 2dly, as privilege of speech in parliament was allowed to every member of parliament; in like manner also he was privileged in publishing a correct account of his speech in parliament. The learned Judge was of opinion that it was not necessary to prove malice, but it might be inferred from the publication itself: and upon the authority of the case of *Rex* v. *Lord Abingdon* (*a*) he held that a member of parliament is answerable for publishing what he has delivered as his speech in parliament, if it contain defamatory matter; and that question he left to the jury, stating to them that they were to look both to the matter and manner of the publication in order to decide whether it was libellous or not. The jury found the defendant guilty.

Brougham moved for a new trial on the ground of a misdirection of the learned Judge. He contended that *Rex* v. *Lord Abingdon* had been supposed to carry the law farther than it really did. In that case, according to a MS. note which had been furnished him of what passed at the trial, and which in some respects was more full than what appeared by the report, it was proved that the prosecutor was the defendant's attorney, and that the defendant having had a quarrel with him went to the House

(*a*) 1 *Esp. N. P. C.* 226.

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of Lords, accuſed him of unprofeſſional and diſhoneſt practices, and in order to have a handle for publiſhing the libel, gave notice of his intention to introduce a bill into parliament; and afterwards publiſhed the libel at his own expence. That caſe therefore afforded ſtrong evidence to ſhew that the whole was founded in malice; and to juſtify what Lord *Kenyon* C. J. ſaid, that a member of parliament had no right to make his ſpeech a vehicle of ſlander; and thus the publiſher might well be held reſponſible in that caſe, and yet not in the preſent: for his Lordſhip emphatically added, that in order to conſtitute a libel the mind muſt be in fault, and ſhew a malicious intent to defame. Now here, there is not only no proof of any malicious intent, but the inference alſo is rebutted by the occaſion of the publication; which was not made a vehicle of ſlander, but was for a bonâ fide purpoſe of correcting miſrepreſentation touching a matter which had paſſed in parliament; and therefore although it may incidentally contain reflections againſt an individual, the publiſher is not reſponſible. In *Lake* v. *King* (*a*) it was held, that an action would not lie for printing a petition to parliament and delivering it to the members, it being agreeable to the courſe and proceedings in parliament: and in *Rex* v. *Wright* (*b*), (which occurred ſome years after *Rex* v. *Lord Abingdon*,) a criminal information was refuſed for publiſhing the report of a ſelect committee of the Houſe of Commons, which contained a paragraph charging an individual with having views hoſtile to the government: and the Court refuſed it on this ground, viz. that the publication was a true copy of the report, which was a proceeding in parliament; and Lord *Kenyon* C. J.

(*a*) 1 *Saund.* 131. (*b*) 8 *T. R.* 293.

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ſaid, that it was impoſſible to admit, what was aſſumed as the foundation of that application, that the proceedings of either houſe of parliament were libellous. And *Lawrence* J. adverted to the diſtinction in *Waterfield* v. *Biſhop of Chicheſter* (*a*), that the charge there was that the plaintiff had not publiſhed a true account; and that the Court declared ſuch falſe account a libel: and he alluded alſo to *Curry* v. *Walter* (*b*), where *Eyre* C. J. held that the publiſhing in a newſpaper a ſpeech delivered by a counſel upon a motion made in this court was not a libel; it being a true account of what paſſed in a court of juſtice: and *Lawrence* J. added, that although the publication of ſuch proceedings might be diſadvantageous to the individual concerned, yet it was of vaſt importance to the public that they ſhould be known. The ſame reaſons (as was ſaid) apply alſo to proceedings in parliament: indeed, according to 4 *Inſt.* 23., recognized by *Bayley* J. in *Burdett* v. *Abbot* (*c*), the Houſe of Commons is a court of judicature. The caſe therefore of *Rex* v. *Wright* is deciſive of the preſent: there is only this difference, that there it was a publication of the report of a committee of the Houſe of Commons; here it is that of the ſpeech of a member of that Houſe; but both are equally proceedings of that Houſe: and it was held in that caſe that to publiſh a correct account of ſuch proceedings is not libellous. Only it muſt be farther obſerved in favour of the defendant in this caſe, that he had an intereſt in the publication which the defendant in *Rex* v. *Wright* had not; and which alſo diſtinguiſhes it from *Rex* v. *Lord Abingdon*: for he had an intereſt as a mem-

(*a*) 2 *Mod.* 118. (*b*) 1 *Bos. & Pull.* 525. (*c*) 14 *East*, 159.

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ber of the Houſe of Commons, the repreſentative body, in defending himſelf before his conſtituents againſt miſrepreſentation; and as he ſerves for the whole realm when he is returned to parliament, and not merely for the body of electors who return him (*a*), ſuch defence of himſelf may be as general. And in the Commons journals (*b*) will be found many reſolutions againſt printers and newſpapers publiſhing the ſpeeches of members or reports of committees in that Houſe, but none againſt a member himſelf ſo doing. The general rule then to be collected from theſe and other caſes which are analogous (*c*) ſeems to be this, that although the publication of a matter may be injurious to the character of an individual; yet if done bonâ fide, by a party who has an intereſt in the matter; or who is warranted by the occaſion; in either caſe it will be juſtified. Here both thoſe circumſtances concurred to juſtify the defendant.

Lord ELLENBOROUGH C. J. If any doubt belonged to this queſtion, I ſhould be moſt anxious to grant a rule to ſhew cauſe, in order to have the grounds of doubt more fully diſcuſſed and ſettled. But as I cannot find any thing on which to found even a color for argument, except what ariſes from an extravagant conſtruction put on a particular expreſſion of Lord *Kenyon* in the caſe of *Rex* v. *Wright*, it would be to excite doubts, and not to ſettle them, if we were to grant the rule. What Lord *Kenyon* there ſaid was this, "That it was impoſſible to admit that the proceeding of either of the Houſes of parliament

(*a*) 4 *Inſt.* 14. 1 *Bl. Comm.* 159.

(*b*) 6 *Feb.* 1640. 11 *Feb.* 1695. 23 *Jan.* 1722. 26 *Feb.* 1728. 13 *Apr.* 1738.

(*c*) 4 *Eſp. N. P. C.* 191. *Delany* v. *Jones.* 1 *T. R.* 111. *Weatherſton* v. *Hawkins.*

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was a libel; and yet that was to be taken as the foundation of the application made in that case." I will not here wait to consider whether that could be strictly called a proceeding in parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in parliament in the terms given to some of the judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons house of parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there; but unauthorized by the house, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. The only question is whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an oratio ad populum in order to explain his conduct to his constituents? There is no case in practice, nor I believe any proposition laid down by the best text writers upon the subject, that tends to such a conclusion. The case of *Rex* v. *Wright* indeed determined that a proceeding in parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as

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was held in *Rex* v. *Lord Abingdon*. As to *Curry* v. *Walter*, it is not neceſſary for the preſent purpoſe to diſcuſs that caſe: whenever it becomes neceſſary, I ſhall ſay that the doctrine there laid down muſt be underſtood with very great limitations; and ſhall never fully aſſent to the unqualified terms attributed in the report of that caſe to *Eyre* C. J. In the preſent caſe the queſtion was left to the jury whether the publication was libellous, taking into their conſideration all the circumſtances; and nothing was ſubtracted from their conſideration. The jury have found that it was; and I can ſee no ground for drawing the ſubject again into diſcuſſion, in order to excite doubts which do not at preſent exiſt. In *Lake* v. *King* the judgment of Lord *Hale* and of the other Judges was founded upon this point, viz. that it was the order and courſe of proceedings in parliament to print and deliver copies, of which the Court ought to take judicial notice. In order therefore to bring this caſe within the rule in *Lake* v. *King*, we ought to find that it is the order and courſe of proceedings in parliament, that members ſhould print their own ſpeeches; and that this Court will take judicial notice of ſuch a courſe of proceeding. The very ſtatement of the propoſition ſhews it to be untenable. It is therefore neither within *Lake* v. *King* nor *Rex* v. *Wright*, giving to that caſe its fulleſt effect; and even if it were, perhaps the Court would lay down the doctrine with ſomewhat more limitation than is to be found in that caſe.

GROSE J. I am not diſpoſed to find any fault either with the direction of the learned Judge or the finding of the jury. In *Rex* v. *Lord Abingdon* the ſame arguments which have been addreſſed to the Court to-day were

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fully considered by Lord *Kenyon*. It was competent to the jury to find the defendant guilty, if upon consideration of all the circumstances, they deemed the publication malicious.

BAYLEY J. If the case admitted of any doubt I should be desirous of granting a rule. But the case is without difficulty. A member of parliament has undoubtedly the privilege for the purpose of producing parliamentary effect to speak in parliament boldly and clearly what he thinks conducive to that end. He may even for that purpose, if he thinks it right, cast imputations in parliament against the character of any individual; and still he will be protected. But if he is to be at liberty to circulate those imputations elsewhere, the evil would be very extensive. No member therefore is at liberty so to do. In *Lake* v. *King* such was the impression of the lawyers of that day. There the defendant did not justify the printing and delivering the petition to divers subjects, &c. generally, but to divers subjects being members of the committee appointed by the Commons; and such publication was held justifiable, because it was according to the order of proceedings of parliament and their committees. But it is not contended to-day that it is according to the course and order of parliament for members to communicate their speeches to the printers of newspapers, in order to give them to the world in a more corrected form. If any misrepresentation respecting them should go forth, there is a course perfectly familiar to all members, by which such misrepresentation may be set right, viz. by complaining to the House of the misrepresentation, and having the author of it at the bar to answer to such complaint: therefore it is not

neceſſary for the purpoſe of correcting the miſrepreſentation that a member ſhould be the publiſher of his own ſpeech. It has been argued that the proceedings of courts of juſtice are open to publication. Againſt that as an unqualified propoſition I enter my proteſt. Suppoſe an indictment for blaſphemy, or a trial where indecent evidence was neceſſarily introduced, would every one be at liberty to poiſon the minds of the public by circulating that which for the purpoſes of juſtice the court is bound to hear? I ſhould think not: and it is not true therefore that in all inſtances the proceedings of a court of juſtice may be publiſhed. Again it may be ſaid that counſel have a right, in purſuance of their inſtructions, and whilſt the cauſe is going on, to endeavour to produce an effect by making ſuch obſervations on the credit and character of parties and their witneſſes, as ſometimes when the cauſe is over perhaps they are ſorry for. But have they therefore, or any other perſon who hears them, a right afterwards to publiſh thoſe obſervations. I have no heſitation in ſaying that when the occaſion ceaſed, the right alſo would ceaſe, and that it would be no juſtification to plead that ſuch a publication was a tranſcript of the counſel's ſpeech. So here I think the occaſion did not juſtify the publication. The ground of the argument therefore fails, and I ſee no reaſon for diſturbing the verdict.

LE BLANC J. As this indictment was tried before me, I was unwilling to give any opinion until I heard thoſe of my Lord and my brethren: but now that I have ſo done, I deſire to expreſs my entire concurrence in thoſe opinions. It has been correctly ſtated by the learned counſel, that at the trial I overruled the objection taken

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by way of anſwer to this indictment, viz. that this was a correct repreſentation of the ſpeech delivered by the defendant in parliament. I did over-rule it; and ſaid that ſtill it was a queſtion for the jury whether the ſubject-matter was libellous. The learned counſel then addreſſed the jury, and I ſtated to them the view in which the caſe ſtruck my mind, and told them that they were to conſider whether the publication tended to defame the proſecutor; that I was of opinion it did; ſtill, however, leaving the queſtion to them. I further ſtated to them that where the publication is defamatory, the law infers malice, unleſs any thing can be drawn from the circumſtances attending the publication to rebut that inference; and I left it to them to ſay whether the circumſtances of this caſe did rebut that inference; adding, that in point of law, the circumſtance of its being a publication of a ſpeech delivered by a member of the Houſe of Commons did not rebut it. As to the right of a member of parliament to ſpeak in parliament what is defamatory to the character of another, that ſitting in a court of juſtice we were not at liberty to inquire into that; becauſe every member had privilege of ſpeech in parliament: but when he publiſhed his ſpeech to the world, it then became the ſubject of common law juriſdiction; and the circumſtance of its being accurate, or intended to correct a miſrepreſentation, would not the leſs make him amenable to the common law in reſpect of the publication. If any thing had ſince occurred in the courſe of this argument to induce me to change the opinion I entertained and pronounced at the trial, I ſhould have been open to conviction, and thought it right to ſend the caſe down again for farther conſideration: but it is my duty, after I have heard what has fallen from

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from the Court, to ſay that I ſtill continue of the ſame opinion.

Rule refuſed.

The defendant was on a ſubſequent day in this term brought up to receive the judgment of the Court, and a fine impoſed of 100*l.*

MORRIS *againſt* LORD COCHRANE.

Friday, May 7th.

By ſtat. 51 *G.* 3. *c.* 126., one of two candidates for the city of *Weſtminſter* is only liable to the bailiff for a moiety of the expences of the huſtings.

ACTION by the bailiff of *Weſtminſter* againſt the defendant, one of the candidates at the laſt election of members to ſerve for that city in parliament, to recover the expences of the huſtings. The defendant let judgment go by default. Upon the execution of the writ of inquiry, the plaintiff contended that he was entitled to recover againſt the defendant the whole amount of the expences, inaſmuch as by 51 *G.* 3. *c.* 126. the candidates were made jointly liable; and therefore the defendant, not having pleaded in abatement that the other candidate ſhould have been joined, was liable for the whole. The underſheriff ruled upon the conſtruction of the act of parliament, that the defendant was only liable for a moiety of the expences; which the jury accordingly gave.

Richardſon moved to ſet aſide the execution of the writ of inquiry, upon the ground that the underſheriff had miſconſtrued the act. The 51 *G.* 3. *c.* 126., after reciting the 18 *G.* 2. *c.* 18. touching the elections of knights of the ſhire, profeſſes to make proviſion for defraying the expences of the huſtings at *Weſtminſter*, by

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MORRIS *againſt* Lord COCHRANE.

extending to it the proviſions of the recited act, and then it enacts, in conformity with that ſtatute, that the bailiff ſhall erect huſtings at the expence of the "candidate or candidates" generally: which words create a joint liability in the candidates. And it is obſervable that where the legiſlature intended to make the liability ſeparate, it has ſo expreſſed it; as in 34 *G.* 3. *c.* 73. *ſ.* 6. (for erecting booths for adminiſtering the oaths,) the words are "the expences of which booths ſhall be defrayed by the candidates *in equal proportions.*"

Lord ELLENBOROUGH C. J. There is no pretence for ſaying that the candidates are to be conſidered as jointly liable on account of their having a joint intereſt; for they are in point of intereſt the moſt adverſe parties in the world. Then the queſtion is whether the words of the act render them jointly liable. I think the act means only that the whole expences are to be defrayed amongſt the candidates; and if ſo, they are liable in their ſeveral proportions.

Per Curiam, Rule refuſed.

Saturday, May 8th.

——— *againſt* MOOR.

In an action of ſlander, imputing a ſpecific charge of unnatural practices to plaintiff, where the declaration contains the uſual allegation of good fame, &c., the defendant may, upon croſs-examination, aſk the plaintiff's witneſs whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of ſimilar practices, in order to diminiſh the damages.

ACTION for words imputing to the plaintiff unnatural practices. The declaration alleged in the uſual form that the plaintiff was of good fame, &c., and had not ever been guilty, or until the time of committing the ſaid grievance, by the defendant, been *ſuſpected* to

have

have been guilty of the crimes, offences, and miſconduct therein ſtated to have been laid to his charge, or any other ſuch deteſtable crime; by means of which the plaintiff, before the committing the ſaid grievance, had deſervedly obtained the good opinion and credit of all his neighbours and other good ſubjects, to whom he was in any wiſe known. The declaration then ſet forth the words which imputed a ſpecific charge of having committed the offence at the plaintiff's houſe, and concluded with alleging the uſual gravamen, that by means thereof the plaintiff was greatly injured in his fame, inſomuch that divers of his neighbours have on occaſion of the ſpeaking and committing the grievances ſuſpected and ſtill do ſuſpect him to be a perſon guilty of unnatural practices.

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againſt Moor.

At the trial before *Groſe* J., at the laſt aſſizes for *Norfolk*, the witneſs who proved the words, was aſked upon croſs-examination, whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of ſimilar practices, to which queſtion the plaintiff's counſel objected as not being admiſſible: but the learned Judge admitted it upon the authority of the Earl of *Leiceſter* v. *Walter* (*a*), before *Mansfield* C. J., and ſaid that it was evidence to contradict the plaintiff's allegation that he was of good fame, and that the ſpeaking of the words occaſioned the injury to it. Upon this the plaintiff's counſel ſubmitted to a nonſuit.

Sellon Serjt. moved to ſet it aſide, on the ground that this evidence was improperly received, to contradict that which was matter of inducement only and immaterial,

(*a*) 2 *Camp. N. P. C.* 251.

and

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against Moor.

and which the plaintiff was not bound to prove. [Lord *Ellenborough* C. J. The evidence was, I ſuppoſe, received in diminution of the damages, as in the caſe cited, and not in bar: but the plaintiff rather than encounter its effect choſe to be nonſuited.] It was underſtood by the plaintiff that the evidence was admitted in bar to the action, and therefore he was nonſuited.

Lord ELLENBOROUGH C. J. It certainly muſt have been received in mitigation of damages only, for upon looking at the Earl of *Leiceſter* v. *Walter*, I find it was ſo received in that caſe. And certainly a perſon of diſparaged fame is not entitled to the ſame meaſure of damages with one whoſe character is unblemiſhed: and it is competent to ſhew that by evidence. But the plaintiff made his election to be nonſuited, inſtead of meeting the evidence: and this nonſuit is not a bar to another action. I think therefore a rule ought not to be granted.

GROSE J. I read the caſe of the Earl of *Leiceſter* v. *Walter*, at the trial, and meant to act in conformity with what *Manſfield* C. J. had ruled in that caſe. The plaintiff choſe to be nonſuited.

BAYLEY J. It was certainly evidence in mitigation of damages.

Per Curiam, Rule refuſed (*a*).

(*a*) In *Snowdon* v. *Smith*, *Devon Lent* aſſizes, 1811, which was an action againſt the defendant for ſaying "that he had heard that the plaintiff had been guilty of unnatural practices;" to which the defendant pleaded a juſtification, that he had been ſo guilty with divers perſons, naming them. *Chambre* J. would not permit the witneſs, who proved the words to be aſked on croſs-examination, whether reports concerning the plaintiff, ſuch as the defendant ſtated he had heard, had not gone abroad. The caſe of the Earl of *Leiceſter* v. *Walter* was cited, but the learned Judge held that it did not govern the caſe then before him, where the defendant by his plea had put the iſſue upon the truth of the charge imputed.

HALL *againſt* SMITH.

Saturday, May 8th.

ACTION for ſlander. The firſt count of the declaration ſtated that long before the time of ſpeaking and publiſhing the words the plaintiff had been a woolſtapler, to wit, at a certain town called *Cirenceſter*; and alſo before and at the time of ſpeaking and publiſhing the words was, and thence hath been, and ſtill is a brewer, and as ſuch was acquiring great gains, to wit, at *Oxford*. That defendant intending to cauſe it to be ſuſpected that the plaintiff had been a bankrupt and was a perſon in inſolvent circumſtances, ſpoke of and concerning the *plaintiff as ſuch trader* as aforeſaid, and of and concerning one *Brookes*, the following words, "Mr. *Hall* and Mr. *Brookes* have both been bankrupts, Mr. *Hall at Cirenceſter*," &c. The ſecond count alleged the words to have been ſpoken of and concerning the plaintiff in his former trade of a woolſtapler; and the third of and concerning the plaintiff in his trade of a brewer. At the trial before *Bayley* J., at the laſt *Oxford* aſſizes, the plaintiff gave no evidence of his having been a woolſtapler, but proved that he was a brewer at *Oxford*; and that the words ſpoken of him by the defendant were theſe: He was a bankrupt at *Cirenceſter*, in *Glouceſterſhire*, in the liquor trade, or wines or ſpirits. It was objected that this proof did not ſupport the allegation that the words were ſpoken of the plaintiff in his trade of a brewer at *Oxford*. The learned Judge was of opinion that it was ſubſtantially proved; the gravamen being this, that the defendant ſaid of the plaintiff, a brewer at *Oxford*,

Where the plaintiff declared that he had been a woolſtapler at *Cirenceſter*, and was a brewer at *Oxford*, and that defendant ſpoke of him as ſuch trader theſe words: "Mr. *H.* (the plaintiff) and *B.* have both been bankrupts, Mr. *H.* at *Cirenceſter*," and gave no evidence of his having been a woolſtapler, but only that he was a brewer at *Oxford*, and proved the words ſpoken to have been theſe, He was a bankrupt at *Cirenceſter*, &c. Held that this proof ſuſtained the allegation that the words were ſpoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirenceſter*.

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HALL *against* SMITH.

Oxford, that he was a bankrupt: but he gave the defendant liberty to move for a nonsuit.

Abbott accordingly moved upon this objection, contending that the words seemed to relate rather to his former trade at *Cirencester*, which was not proved, than to that of a brewer, which was.

Lord ELLENBOROUGH C. J. The place where the plaintiff is stated to have become a bankrupt is immaterial. He might have become bankrupt whilst a brewer at *Oxford*, by an act of bankruptcy committed at *Cirencester*. The substance of the words is this, he was a bankrupt at *Cirencester*: and so he might be whilst carrying on the trade of a brewer at *Oxford*. The declaration imports no more.

Per Curiam, Rule refused.

Saturday, *May* 8th.

ROBINS *against* GIBSON.

Where the drawer of a foreign bill of exchange at the time of the drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house: Held that this was sufficient.

THIS was an action by the plaintiff as indorsee against the defendant as drawer of a foreign bill of exchange. It appeared at the trial before Lord *Ellenborough* C. J., at the *Middlesex* sittings, that the defendant drew the bill at *Buenos Ayres*, and previously to the time of its becoming due returned to this country. When the bill became due it was dishonoured and duly protested; and notice of the dishonour, but not of the bill's having been protested, was left at the defendant's house.

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ROBINS *against* GIBSON.

houſe. His lordſhip held the notice ſufficient, and the plaintiff had a verdict.

Puller moved for a new trial, upon the ground that this being a foreign bill, and as ſuch requiring to be proteſted, a mere notice of the diſhonour left with the drawer, without the proteſt, or at leaſt a copy or notice of the proteſt, was inſufficient. He referred to what was laid down by *Holt* C. J., in *Brough* v. *Parkins* (*a*), viz. "that the proteſt on a foreign bill of exchange is part of the cuſtom," and therefore it muſt be communicated to the party. If the defendant had remained abroad inſtead of returning to this country before the bill was due, there is no doubt that he muſt have had the proteſt.

Lord ELLENBOROUGH C. J. It did not appear that the defendant requeſted to have the proteſt, and it would be hazarding too much to leave it without ſome requeſt. He had due notice of the fact of diſhonour of the bill; and as the circumſtances of parties alter, the rule reſpecting notice alſo changes, according to the convenience of the caſe. If the party is abroad he cannot know of the fact of the bill's having been proteſted, except by having notice of the proteſt itſelf; but if he be at home it is eaſy for him by making inquiry to aſcertain that fact.

Per Curiam, Rule refuſed (*b*).

(*a*) 2 *Ld. Ray.* 993.

(*b*) See 2 *Eſp. N. P. C.* 511., *Cromwell* v. *Hynſon*.

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Saturday, May 8th.

TAYLOR and Another, Aſſignees of WALSH, a Bankrupt, *againſt* BREWER and Others.

Where a perſon performed work for a committee, under a reſolution entered into by them "that any ſervice to be rendered by him ſhould be taken into conſideration, and ſuch remuneration be made as ſhould be deemed right:" Held that an action would not lie to recover a recompenſe for ſuch work, the reſolution importing that the committee were to judge whether any remuneration was due.

ASSUMPSIT to recover a compenſation for work done by the bankrupt. The defendants compoſed a committee for the management of the ſale of lottery tickets, and the bankrupt was employed in going backwards and forwards upon their buſineſs. The plaintiffs founded their claim to compenſation on the following reſolution of the committee: 4th *January* 1810, at a meeting, &c., preſent, *Brewer*, &c., Reſolved, that any ſervice to be rendered by *Walſh* ſhall, after the third lottery be *taken into conſideration, and ſuch remuneration be made as ſhall be deemed right.* Lord *Ellenborough* C. J. was of opinion at the trial, that under this reſolution it was optional in the committee to remunerate the bankrupt or not, according as they ſhould think right, and therefore nonſuited the plaintiffs.

Park moved to ſet aſide the nonſuit, on the ground that the bankrupt was entitled to ſome recompenſe; inaſmuch as an agreement with a perſon that he ſhould do work, and ſhould have what is right for it, did not import that he ſhould have nothing for his trouble if his employer ſhould be ſo minded, but that he ſhould have a reaſonable reward: it ſhould have been left therefore to the jury to conſider what was reaſonable, as was done in *Peacock* v. *Peacock*. (*a*)

(*a*) 2 *Camp. N. P. C.* 45.

Lord

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TAYLOR *againſt* BREWER.

Lord ELLENBOROUGH C. J. In that caſe the defendant expreſsly told the plaintiff that he ſhould have a ſhare in the buſineſs, leaving only unſettled what particular ſhare he was to have: but here, I own it ſtruck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labour deſerved any thing he ſhould be recompenſed for it by the defendants. This was throwing himſelf upon the mercy of thoſe with whom he contracted; and the ſame thing does not unfrequently happen in contracts with ſeveral of the departments of government.

GROSE J. I conſider the reſolution to import that the committee were to judge whether any or what recompenſe was right.

LE BLANC J. It ſeems to me to be merely an engagement of honour.

BAYLEY J. The fair meaning of the reſolution is this, that it was to be in the breaſt of the committee whether he was to have any thing, and if any thing, then how much.

Rule refuſed.

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Saturday, May 8th.

BLUNDELL, Clerk, and THOMPSON, *againſt* HOWARD.

Action againſt the defendant, occupier of a farm in the townſhip of *Down Holland*, for not ſetting out tithes. Defence, a farm modus; and the plaintiff ſhewed by ſurveys and terriers that no modus within the townſhip was mentioned in them; againſt which the defendant proved by witneſſes an uniform payment of a ſum certain in reſpect of his tenement for upwards of 50 years: Held that the plaintiff might on croſs-examination aſk thoſe witneſſes whether other tenements in *Down Holland* did not pay a ſimilar ſum.

DEBT by *Blundell* as rector of *Halſall*, and *Thompſon* as leſſee of a moiety of the tithes, on ſtat. 2 *Edw.* 6. againſt the defendant, occupier of a farm ſituate in *Down Holland*, (one of the five townſhips of which the pariſh of *Halſall* conſiſts) for not ſetting out the tithe of hay and potatoes growing upon the ſaid farm.—Plea, the general iſſue. The defence was a modus of 4*s*., payable at *Eaſter annually* in reſpect of all tithes ariſing from the farm, except corn and horſe beans.

At the trial before *Le Blanc* J. at the laſt *Lancaſter* aſſizes, the plaintiff (the rector) did not rely merely on his common law-right to tithes in kind, as rector, but alſo produced documentary evidence; viz. the general eccleſiaſtical ſurvey 26 *H.* 8.; the parliamentary ſurvey 1658; and ſeveral terriers of the years 1696, 1709, 1738, 1742, 1778, 1789. The ſurveys were ſilent as to any townſhip or farm modus, and the former mentioned tithes as payable throughout the pariſh, and the latter within the townſhip of *Down Holland*; and the terriers made no mention of any modus in this townſhip. On the part of the defendant ſeveral witneſſes proved an uniform payment, for upwards of 50 years laſt paſt, in reſpect of the defendant's eſtate, of 4*s*. at *Eaſter* annually in lieu of all tithes, except corn and horſe beans. Theſe witneſſes were aſked on croſs-examination, "Whether other tenements in *Down Holland* did not pay a ſimilar ſum?" to which queſtion the defendant's counſel objected, on the ground that the iſſue being whether this

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BLUNDELL *against* HOWARD.

this particular tenement was under a modus, it was not competent to the plaintiffs to inquire whether other tenements in the same townſhip paid a ſimilar ſum, in order to derive from a queſtion reſpecting a collateral matter, an anſwer which might be prejudicial to the point in iſſue: but the learned Judge permitted the queſtion to be put, and the witneſſes having anſwered that other tenements in *Down Holland* did pay a ſimilar ſum, the counſel for the plaintiffs in his reply relied much on this circumſtance as ſhewing that this, with the other payments, was made as a portion of ſome compoſition pervading the townſhip, and not as a modus; inaſmuch as the ſurvey which mentioned the townſhip of *Down Holland* could not have been ſilent as to a modus ſo general: and the plaintiffs obtained a verdict.

Topping moved for a new trial, renewing his objection to the admiſſibility of the evidence.

But the Court concurred in opinion with the learned Judge at the trial.

LE BLANC J. The queſtion was not put by the defendant with a view of ſupporting the modus ſet up by him; but was put by the plaintiffs to ſhew that, coupled with the ſilence of the ſurvey as to any modus, co-extenſive with the townſhip, this and the ſimilar payments made in reſpect of different tenements within the townſhip were portions of a ſum in groſs paid throughout the townſhip by way of compoſition for tithe, and not as a modus.

BAYLEY J. I think the queſtion was admiſſible. The point in iſſue was, whether there exiſted a modus for a par-

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particular farm. The ſurveys ſhewed that there was not any modus co-extenſive with the townſhip, or applicable to this farm; but an uniform payment was proved to have exiſted for a number of years, and the doubt was whether this were an ancient payment or a compoſition. Then the queſtion admitted in evidence went to ſhew the ſtate of the diſtrict, of which the farm in queſtion formed a part, with reſpect to ſuch payments.

Lord ELLENBOROUGH C. J. added, that the parliamentary ſurvey had been taken with great pains and accuracy; and that document being ſilent as to the modus, of itſelf afforded ſtrong evidence againſt its exiſtence.

Per Curiam, Rule refuſed.

Saturday, May 8th.

DOE, on the Demiſe of WRIGHT and Others, *againſt* MANIFOLD and Another.

The 29 *Car.* 2. *c.* 3., which requires a will of lands to be atteſted and ſubſcribed in the preſence of the deviſor, means that he ſhould be in a ſituation that he may ſee the witneſſes atteſt: therefore where the atteſting witneſſes retired from the room where the teſtator had ſigned, and ſubſcribed their names in an adjoining room, and the jury found that from one part of the teſtator's room a perſon by inclining himſelf forwards with his head out at the door might have ſeen the witneſſes, but that the teſtator was not in ſuch a ſituation in the room that he might by ſo inclining have ſeen them: Held that the will was not duly atteſted.

EJECTMENT tried before *Gibbs* J., at the laſt aſſizes for the county of *Derby*, brought by two of the three coheireſſes of —— *Cook*, deceaſed, againſt the defendants, who claimed the entirety under his will.

The queſtion was whether the will was duly atteſted by the witneſſes in the preſence of the teſtator: as to which it was proved that the teſtator lay in bed when he executed the will; that the head of his bed was placed againſt a partition which ſeparated the bed-room from

another

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Doe, Lessee of WRIGHT, *against* MANIFOLD.

another room. The door of each of these rooms opened into the same passage; and a night-chair was placed between the testator's bed and the door of his bed-room, very near to the door. After the testator had signed the will, there being no table in his bed-room, the witnesses retired to the other room, and wrote their attestation at a table, which stood before the fire-place of that other room, and the doors of both rooms were open. While the witnesses were retiring for that purpose, with the will, into the other room, the testator called to his attendant who was in the room, using an expression which he commonly used when he required his assistance, to help him to the night-chair; but there was no farther proof of his going to the night-chair.

A number of witnesses swore that a person standing in the bed-room might, by inclining his body and advancing his head through the door-way into the passage, see the table in the other room at which the witnesses wrote their attestation; and several swore that they thought it might be seen by a person sitting on the night-chair and so advancing his head into the passage. Upon this evidence the learned Judge left several questions to the jury; 1st, Whether the testator did actually see the witnesses attest the will: which the jury found in the negative. 2dly, Whether a person being in the bed-room might, by inclining his body and advancing his head into the passage, have seen the witnesses attest the will: upon which they found that he might. And, lastly, Whether the testator was in such a situation in the room that he might, by so inclining his body and advancing his head into the passage, have seen the witnesses attest the will: and the jury found that he was not. Upon which the learned Judge told them that he was of opinion that the

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Doe, Lessee of Wright, *against* Manifold.

will was not duly attested, and that the plaintiff was entitled to a verdict for two-thirds of the premises; and they found accordingly: but he gave the defendants leave to move for a nonsuit.

Clarke accordingly moved on the ground that this was an attestation in the presence of the devisor, within the meaning of the statute of frauds (*a*); for that it was not necessary that a testator, at the time of the attestation, should be in such a situation that he himself might see the witnesses; provided he was in a room from whence they could be seen; and he cited *Sheers* v. *Glasscock* (*b*).

Lord Ellenborough C. J. It is not necessary that a devisor should actually see; but the question is, whether he must not be in such a situation that he might see the witnesses attest. I am old enough to remember the decision of *Casson* v. *Dade* (*c*) upon that point, and afterwards went to view the office, through the window of which it was proved that the testatrix, who sat in her carriage when the will was attested in the office, might have seen what was passing there. In favour of attestation it is presumed that if the testator might see, he did see. But I am afraid that if we get beyond the rule which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence; as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence (*d*). If the

(*a*) 29 *Car.* 2. *c.* 3. *s.* 5. (*b*) *Carth.* 81. *Salk.* 688. 1 *Eq. Abr.* 403.
(*c*) 1 *Bro. C. C.* 99.
(*d*) See *Eccleston* v. *Petty al. Speke*, *Carth.* 80. *Comb.* 156. 1 *Show.* 89. *Holt*, 222. *Broderick* v. *Broderick*, 1 *P. Wms.* 239. *Machell* v. *Temple*, 2 *Show.* 288.

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DOE, Leſſee of WRIGHT, *againſt* MANIFOLD.

jury had not negatived the teſtator's being in a ſituation that he might have ſeen the atteſtation, I ſhould have had great doubts on this caſe.

BAYLEY J. In the caſe of *Sheers* v. *Glaſſcock* it was proved that the teſtator *might* ſee, from the bed where he lay, the table at which the witneſſes ſubſcribed their names (*a*).

Per Curiam, Rule refuſed.

(*a*) See alſo *Davy* v. *Smith*, 3 *Salk.* 395.

ROE d. DINGLEY *againſt* SALES.

Saturday, May 8th.

EJECTMENT for the recovery of premiſes demiſed for a term of years by the leſſor of the plaintiff to the defendant. The leaſe contained a proviſo for re-entry in caſe the "defendant, his executors or adminiſ- "trators, ſhould demiſe, leaſe, grant, or let the ſaid "demiſed premiſes, or any part or parcel thereof, or "convey, alien, aſſign, or ſet over the indenture or his "or their eſtate therein, or any part thereof, to any "perſon or perſons whomſoever, for all or any part of "the ſaid term, without the ſpecial licence and conſent "of the leſſor, his heirs or aſſigns, in writing under his "or their hand or hands for that purpoſe firſt obtained." It appeared on the trial, at the laſt *Kent* aſſizes, that the defendant, without the licence of the leſſor, had let a perſon of the name of *Pincheon* into the occupation of part of the premiſes, under the following terms: "that "he (*Pincheon*) ſhould have the uſe of the back cham-

Where a leaſe contained a proviſo for re-entry in caſe the tenant ſhould demiſe, leaſe, grant or let the demiſed premiſes, or any part or parcel thereof, or convey, &c. to any perſon whomſoever, for all or any part of the term, without the licence of the leſſor in writing; and the defendant, without ſuch licence, agreed with a perſon to enter into partnerſhip with him, and that he ſhould have the uſe of the back-chamber and ſome other parts of the premiſes *excluſively*, and of the reſt jointly with the defendant, and accordingly let him into poſſeſſion. Held that the leſſor was entitled to re-enter.

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" ber excluſive of his (the defendant's) family, the " ſaw-lodge, the whole length of the cow-ſhed to the " ſtable, and any part of the yard for laying timber, or " otherwiſe, *Pincheon* to have jointly with the defend- " ant's family the uſe of the other part of the houſe, as " alſo the garden, which premiſes *Pincheon* is to deliver " up on being required ſo to do, on having three months " notice from the defendant; and it was agreed that the " ſaid parties ſhould enter into partnerſhip in the buſi- " neſs of general ſhopkeeper, each to bring in an equal " ſum of money, and equally divide the profits of the " goods ſold therein, as well as the produce of the gar- " den." Upon this evidence a verdict was found for the plaintiff.

Beſt Serjt. moved for a new trial, on the ground that this was not ſuch a letting or aſſigning as was contemplated in the proviſo: it was merely accommodating *Pincheon* with a lodging in the houſe, whilſt he and the defendant carried on buſineſs in partnerſhip together; for which *Pincheon* was not to pay any rent; and the defendant ſtill continued to occupy the premiſes as tenant, and to be anſwerable to the leſſor for the rent and ſervices in reſpect of the whole in the ſame manner as before. Such a letting, therefore, ought not, conſiſtently with the ſtrict rule of conſtruction adopted in caſes of forfeiture, to be held within the meaning of this proviſo.

Lord ELLENBOROUGH C. J. It is a parting with the excluſive poſſeſſion of ſome part of the demiſed premiſes; whether gratuitouſly or for rent reſerved is very immaterial to the landlord, who meant to guard againſt

having any other than the perſon in whom he confided as tenant, let into poſſeſſion without his conſent. 1813.

Per Curiam, Rule refuſed.

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GOODTITLE, on the Demiſe of RADFORD, *againſt* SOUTHERN.

Saturday, May 8th.

EJECTMENT for two cloſes of land in the pariſh of *Darley*, in the county of *Derby*, tried before *Gibbs* J. at the laſt aſſizes for that county. The defendant claimed under the following deviſe in the will of *Richard Southern*: "I give and deviſe *all* that my farm, lands, and hereditaments called *Trogues-farm*, ſituate within the pariſh of *Darley*, in the county of *Derby*, *now in the occupation of* A. Clay, unto my brother *John Southern*, and to his heirs and aſſigns for ever." The leſſor of the plaintiff claimed under the reſiduary clauſe in the ſame will; which it was admitted would entitle him to the premiſes in queſtion, provided they did not paſs to the defendant under the above deviſe. On the part of the leſſor of the plaintiff it was proved that *Trogues* farm was in the occupation of *A. Clay*; but the cloſes in queſtion were not in his occupation, but in the occupation of one *Marſden*: and in order to ſhew that they were not parcel of *Trogues* farm, and that the teſtator *Richard Southern* did not take them as ſuch, the will of one *Houghton*, deceaſed, was produced; which contained the following deviſe (inter alia) to *R. Southern*, "Alſo all that piece or parcel of ground ſituate in the liberty of *Wanſley*, and in the pariſh of *Darley*, commonly called or known by the name of *Trogues*, otherwiſe *Trough's-paſture*; and alſo

Deviſe of "all that my farm called *Trogues-farm*, now in the occupation of *A. C.*," is not neceſſarily limited to the lands of *Trogues* farm in the occupation of *A. C.*, but may be ſhewn by evidence to extend to other lands of *Trogues* farm not in his occupation.

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all thoſe *two cloſes* of land ſituate at the bottom of the paſture called *Trogues*, otherwiſe *Trough*'s paſture, called by the name of the *Dale-cloſes*." *R. Southern*, when he became entitled to this land under *Houghton*'s will, about 13 years ſince, let the two cloſes to *Marſden*, and evidence was offered of payment of rent by *Marſden* to *R. Southern*, in order to ſhew that *R. Southern* knew in whoſe occupation the land was. On the part of the defendant, a notice to quit was proved, which had been given to *Marſden* by *R. Southern* a few months before the time of making his will; which notice was in theſe terms: "I do hereby give you notice to quit and deliver up the poſſeſſion of all my lands *belonging to and called* Trogues-farm, ſituate in the pariſh of *Darley*, *now in your poſſeſſion*, on or before *Lady-day* next." This evidence was objected to by the counſel for the plaintiff, but was admitted by the learned Judge, and thereupon the plaintiff was nonſuited.

Vaughan Serjt. now moved to ſet aſide the nonſuit, on the ground that this being a ſpecific deviſe of *Trogues-farm* in the occupation of *Clay*, and *Trogues-farm* being proved in his occupation, there was a clear deſcription of property for the deviſe to operate upon; and conſequently it admitted of no extenſion to other lands, not in the occupation of *Clay*, although they might be parcel of *Trogues-farm*: for ſuch a conſtruction would amount to a complete rejection of the words "in the occupation of *Clay*." And as the deviſe would admit of no extenſion, the evidence which was received for the purpoſe of extending it was conſequently improperly received.

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Lord ELLENBOROUGH C. J. Parcel or no parcel is always a queſtion of evidence for a jury; and in the ſame manner it was competent to ſhew here, if there was any doubt, that the two cloſes were parcel of *Trogues-farm*, by which name the thing deviſed was ſufficiently aſcertained. The teſtator certainly contemplated theſe cloſes as parcel of *Trogues-farm*, when he gave the notice to quit. That is clearly an expoſition of the deſcription which he uſed in his will. As to the argument, that the words of the deviſe are ſatisfied by applying them to the farm in *Clay*'s occupation, and therefore cannot be extended to the cloſes in queſtion; it may be anſwered that if theſe cloſes were parcel of *Trogues-farm*, the word "all" in the deviſe would not be ſatisfied without including them. The teſtator was miſtaken as to the perſon in whoſe occupation the two cloſes were; but the deviſe is ſufficiently comprehenſive: it is clear that he meant to paſs all which was called *Trogues-farm*, which is a plain and certain deſcription; and the defective deſcription of the occupation will not alter the deviſe.

LE BLANC J. The only queſtion is on the admiſſibility of the evidence; and that queſtion has been determined by the caſes; ſome of which have been before the Courts very recently (*a*). This was clearly a latent ambiguity, which may be explained by evidence.

BAYLEY J. The teſtator deviſes "all his farm called *Trogues-farm*;" and it was competent to ſhew by evidence of what parcels that farm conſiſted.

Per Curiam, Rule refuſed.

(*a*) 5 *Eaſt*, 79. *Roe* v. *Vernon*. 11 *Eaſt*, 58. *Goodright* v. *Pears*. 15 *Eaſt*, 309. *Marſhall* v. *Hopkins*.

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Monday, May 10th.

FRENCH *againſt* BELLEW and CULLIMORE.

Where an affidavit of debt contained no place in the jurat, but purported to be ſworn before the Chief Juſtice of the King's Bench of *Ireland*, and to be ſigned by him, and ſuch ſignature was verified by affidavit here: Held that it was ſufficient foundation for arreſting the defendant under a Judge's order on meſne proceſs.

THE defendant *Cullimore* was arreſted on meſne proceſs in this cauſe by a Judge's order, upon an affidavit of debt for 1200*l.* purporting to be ſworn before the Chief Juſtice of the King's Bench of *Ireland*, and to bear his ſignature, but no place was mentioned in the jurat: but the ſignature of the Chief Juſtice was verified by an affidavit ſworn before a Judge of this court at Serjeants' Inn.

Richardſon moved to diſcharge the defendant out of cuſtody upon filing common bail; on the ground that the affidavit of debt ought to have contained ſome place or county, or at leaſt the affidavit verifying it ſhould have ſupplied the omiſſion by ſhewing where it was made: otherwiſe, if falſe, the party making it could not be indicted for perjury in the courts of this country or in thoſe of *Ireland*; the law of *England* and *Ireland* being in this reſpect the ſame. And admitting, according to *Omealy* v. *Newell* (*a*), that the affidavit need not be ſuch as, if falſe, to be capable of ſupporting an indictment ſpecifically for perjury; yet, as the uſing a falſe affidavit was conſidered in that caſe to be puniſhable by indictment, it muſt be in ſuch form as to be capable of ſupporting an indictment for that offence; which this affidavit is not causâ quâ ſupra. Beſides, although this Court ſo far takes judicial notice of the authority of the Judges both of *Ireland* and *Scotland* to take affidavits, as not to require any verification of their competence ſo to

(*a*) 8 *Eaſt*, 364.

do;

do; which in the case of affidavits made before foreign magistrates it always requires; yet it goes no farther: and therefore in such cases it is necessary to shew that their authority was exercised within its proper jurisdiction.

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Lord ELLENBOROUGH C. J. The only question is this, whether in the exercise of our discretion we must not presume that the Chief Justice of *Ireland* acted within that jurisdiction within which alone he was competent to act, viz. by taking the affidavit and subscribing his name to it in *Ireland*. I think we cannot presume that he acted in this case out of his jurisdiction. The practice of the Court in requiring an affidavit to be made for the purpose of arresting under a Judge's order is for the guidance of its discretion, that the amount of the debt may be made to appear before it interposes its authority. It is in the nature of a solemn certificate of the existence and reality of the debt: but that may be made to appear by any such species of evidence as the Court may deem in its nature reasonable. Is this then such a solemn certificate as the Court may reasonably be satisfied with? I think, considering the high office of the person whose signature the affidavit bears, we ought to give credence to it as an act done conformably to the authority vested in him. The principle of holding a party to bail under the authority of the Court was much considered in *Omealy* v. *Newell*.

LE BLANC J. It is not necessary in all instances that the affidavit of debt should be in that form which is capable of supporting an indictment for perjury; for then an affidavit of debt sworn before a magistrate in a foreign country would be insufficient; whereas the Court is in the

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FRENCH *against* BELLEW.

the habit of acting upon such affidavits: and on the other hand refuses to admit them when sworn before a justice of the peace or mayor of a borough. This shews that the criterion of receiving such affidavits is not that the party making them may be indicted for perjury if false, but that they are only to guide our discretion here in ordering bail.

Per Curiam, Rule refused.

Tuesday, May 11th.

ROWE *against* ROACH. (*a*)
Same *against* HOAR the Younger.

Where the declaration stated that the plaintiff was lawfully possessed of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement cautioning persons against purchasing the ore, &c. per quod he was prevented from selling; to which the defendant pleaded in justification that the adventurers of, or persons having an interest or shares in the mines, thought it their duty to caution persons against purchasing the ore, &c. (pursuing the words of the advertisement); this plea was held ill on special demurrer; 1st, because it did not disclose the names of the adventurers, or who they were: and 2dly, because it did not shew that the defendant, in publishing the advertisement, acted under the direction of the adventurers. The allegation by plaintiff that he was lawfully possessed of the mines and ore, seems a sufficient allegation of title, unless specially demurred to. The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good without the word false.

CASE for slander of title. The declaration stated that the plaintiff, before and at the time of committing the grievance, was *lawfully possessed* of certain copper mines

(*a*) This and several other cases, which will be noted as they occur, were argued at Serjeant's-Inn Hall. At the end of last term, in consequence of the accumulation of cases standing in the special paper, Lord *Ellenborough* C. J. announced to the bar that the Judges of this court would sit at Serjeant's-Inn on the 25th of *April*, (being some days before the commencement of *Easter* term,) for the purpose of hearing the cases argued; and they accordingly sat there and were attended by counsel, and heard many of them argued on that and several successive days, and expressed their opinion in some, and in others reserved it for farther consideration. Such of the cases as were not reserved, were afterwards called on the first paper day in this term;

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mines ſituate in the pariſh of *St. Auſtell*, in the county of *Cornwall*, called the *Crinni*'s mines, and of certain copper ore got and to be gotten from them of a large value, and was about to contract and was in treaty for contracting with certain perſons called the Crown Copper Company for the ſale to them of divers large quantities of ore, &c.: that the defendant, well knowing the premiſes, but intending to injure him in the poſſeſſion of the mines and in the ſale of the ſaid ore, and to deprive him of the profits to be derived therefrom, wrongfully and unlawfully printed and publiſhed, and cauſed to be printed and publiſhed in a certain public newſpaper a certain *malicious, injurious, and unlawful* paragraph or advertiſement of and concerning the ſaid mines and the ſale of ore therefrom to the tenor following: "To the purchaſers of copper ore from *Crinni*'s mines, in the pariſh of *St. Auſtell*. The adventurers of thoſe mines think it their duty to caution perſons againſt purchaſing the ores ariſing from the ſame, as they will be liable to be called on for the amount by the adventurers; a bill in equity being under preparation to reſtrain the future ſale, and for an account of the produce ariſing from the paſt, with a manager or receiver, and an injunction againſt any future ſale;" per quod the Crown Copper Company refuſed to contract with him, and the plaintiff

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term; when Lord *Ellenborough* C. J. formally pronounced judgment in them; and they are now reported as of the day on which the judgment was ſo pronounced. The Reporters think it their duty to ſtate that they were abſent from *London* during the time that the ſittings were holden at Serjeant's-Inn; and that they are indebted to the kindneſs of two gentlemen at the bar for the notes, from which the reports of all the caſes there argued are compiled; for which they beg to return their grateful acknowledgments to thoſe two gentlemen.

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was prevented from selling to them and others, &c. There was a second count, which did not materially vary from the former. The defendant pleaded, 1st, not guilty; and 2dly, as to the printing and publishing the several paragraphs, &c. in the declaration mentioned, &c. that before and at the time of printing and publishing, &c. *the adventurers of or persons having an interest or shares in the said mines*, thought it their duty to caution persons against purchasing the ores arising from the same, as such persons so purchasing would be liable to be called on for the amount, by the adventurers or persons having an interest or shares in the said mines, and a bill in equity was at the time of the printing and publishing, &c. in preparation, and intended to be filed in the Court of Chancery against the plaintiff by the adventurers of or persons having an interest or shares in the said mines, to restrain the future sale of the ore arising from the said mines, and for an account of the produce arising from the ore before gotten by the plaintiff from the said mines, with a manager or receiver, and for an injunction against any future sale of the said ore. Wherefore the defendant printed and published, and caused to be printed and published, the paragraph or advertisement in the declaration mentioned, as he lawfully might for the cause aforesaid. To this plea there was a demurrer, assigning for causes, 1st, that it is not alleged, nor does it appear in or by that plea, who were or are the supposed adventurers of or persons having or claiming to have an interest or shares in the said mines in that plea mentioned, or what were or are the names of those persons, or of any of them: 2dly, that it does not appear that the several paragraphs or advertisements mentioned in the plea were printed and published by the

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the defendant at the requeſt, or by the direction, or with the privity of the adventurers of or perſons having an intereſt or ſhares in the ſaid mines in the ſaid plea mentioned: 3dly, that it does not appear that the printing and publiſhing the ſaid paragraphs or advertiſements were done in the exerciſe of the ſuppoſed duty in the plea mentioned: 4thly, that it does not appear that it was neceſſary, for the purpoſe of ſecuring or protecting the rights, claims, or intereſts of the before mentioned adventurers or perſons in the plea mentioned, that the ſaid paragraphs and advertiſements ſhould be ſo printed and publiſhed by the defendant, as in that plea alleged; 5thly, that although it is alleged, that the adventurers and perſons did think it their duty to caution perſons againſt purchaſing the ore ariſing from the ſaid mines, yet it does not appear that it was their duty or that they had any right ſo to do: and laſtly, that the ſaid plea is not ſufficiently explicit to enable the plaintiff to prepare himſelf to negative or falſify by evidence the pretended intereſt, ſhares, or claims of thoſe perſons; and that the ſaid plea is much too general, and that no ſafe, certain, or ſufficient iſſue can be taken by the plaintiff thereon; and alſo that the ſaid plea is in other reſpects uncertain, defective, and inſufficient in law. Joinder in demurrer

Richardſon, in ſupport of the demurrer, inſiſted upon the two firſt cauſes aſſigned: 1ſt, that the names of the adventurers or perſons claiming to have an intereſt in the mines were not ſtated; 2dly, that there was no connection ſhewn between the adventurers and the defendant. 1ſt, It was incumbent on the defendant to apprize the plaintiff who were the adventurers that claimed, in order

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der to give him an opportunity of meeting their claims, and of ſhewing, if he was able, that they had no colour of right: for if they had a bonâ fide claim, it muſt be admitted, after what was laid down in *Sir G. Gerard* v. *Dickenſon* (*a*), and was decided in *Hargrave* v. *Le Breton* (*b*), and *Smith* v. *Spooner* (*c*), that ſuch an action as the preſent would not be maintainable againſt them, nor againſt the defendant if he was acting under their authority: but then in order to ſhew that they had a bonâ fide claim, it is neceſſary to ſhew firſt who they are that claim, otherwiſe both they and the defendant muſt be taken as mere intruders. The declaration ſtates a primâ facie title in the plaintiff; the plea, therefore, which cannot be good unleſs the ſlander imputed by the declaration was publiſhed under ſome colour of right, ſhould at leaſt have diſcloſed to the plaintiff ſo much as would have led him to a knowledge of the perſons claiming that right. But 2dly, ſuppoſing it unneceſſary to name the perſons in whom the intereſt is alleged, and that it may be done in this general way, ſtill the plea is defective; becauſe it does not ſhew that the defendant was either one of thoſe unnamed perſons, or that he was acting under their authority and on their behalf; ſo that the ſlander does not appear by the plea to have been publiſhed either in maintenance of his own title or of the title of thoſe for whom he was concerned. Neither if the plea had ſo alleged would it have helped the defendant; becauſe the publication does not import that it was for himſelf, which is lawful; but on the contrary for the purpoſe of countenancing the title and intereſt of ſtrangers, which is not lawful; and therefore when he is ſued for it, he cannot excuſe himſelf

(*a*) 4 *Rep.* 18. *a.* (*b*) 4 *Burr.* 2422. (*c*) 3 *Term.* 246.

by

by intitling himſelf, when the publication at firſt did not import as much. *Pennyman* v. *Rabanks* (*a*), *Earl of Northumberland* v. *Byrt* (*b*). 1813.

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Bayley, for the defendant, did not addreſs himſelf in anſwer to the above cauſes of demurrer, but took objection to the declaration, 1ſt, that it did not ſet forth any certain title in the plaintiff. It ſtates that he was lawfully poſſeſſed of the mines; and ſo he might be as tenant at ſufferance; and yet a tenant at ſufferance cannot ſell: or he might be poſſeſſed by virtue of a bailment for a ſpecial purpoſe only, and without any power of diſpoſal: a poſſeſſion of either ſort would be enough to ſatisfy this allegation, and yet neither would entitle the plaintiff to this action. Beſides in all the precedents upon this head, ſome title in certain will be found to be alleged, as derived either by ſeiſin in fee, in tail, or for life, &c.: whereas this reſts upon a bare poſſeſſion of the mines and of the ore. 2dly, The declaration ſtates no words of direct charge againſt the title of the plaintiff, without which they are not actionable. *Cruſh* v. *Cruſh* (*c*). *Sir T. Greſham* v. *Grinſley* (*d*). Neither does it allege that the publication is falſe.

Lord ELLENBOROUGH C. J. The allegation that it was malicious, injurious, and unlawful, is ſufficient. The firſt objection to the declaration is the only one of any weight; and the anſwer to that is, that it ſhould have been taken advantage of by ſpecial demurrer.

(*a*) *Cro. El.* 427.
(*b*) *Cro. Jac.* 163.
(*c*) *Yelv.* 80.
(*d*) *Ibid.* 88.

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Then as to the cauſes of demurrer aſſigned by the plaintiff, they ſeem to me to be eſtabliſhed. For the defendants, as far as appears from theſe pleadings, are mere ſtrangers; and the law makes no allowance for the ſlander of ſtrangers, whatever it may do in behalf of thoſe who have a real title, or a claim of title. "Rei immiſcet ſe alienæ" (*a*) is the good ſenſe which muſt govern this caſe: here the defendant is a ſtranger himſelf, and ſhews no authority from thoſe who are parties in intereſt.

Per Curiam, Judgment for the Plaintiff.

(*a*) 1 *Jenk. Cent.* 247. *pl.* 36.

Tueſday, May 11th.

MIDDLEHAM *againſt* BELLERBY. (*a*)

Where the putative father of a baſtard child gave a *voluntary* bond, and not under the compulſion of ſtat. 6 *G.* 2. *c.* 31., to the pariſh officers conditioned for the payment of a ſum certain every three months until the child ſhould be *deemed* capable of providing for herſelf: Held that ſuch bond was good, and the condition ſufficiently certain.

DEBT on bond. The declaration ſet forth the condition of the bond, which was for payment by the defendant to the plaintiff, then overſeer, and to the overſeer for the time being of the townſhip of *Shadwell*, in the pariſh of *Thorner*, in the county of *York*, of the ſum of 1*l.* 19*s.* every three months for ſo long as and until a certain baſtard child (of which the defendant was recited to be the putative father) ſhould be *deemed* capable of providing for herſelf. The breach aſſigned was, in not paying, &c. to the plaintiff, or the overſeer for the time being, according to the terms of the condition, although the ſaid child was ſtill living, and not capable or deemed capable of providing for herſelf.

(*a*) This caſe was argued at Serjeants-Inn.

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The defendant after oyer of the bond and condition, demurred to the declaration; assigning for cause, that it appears by the condition, that the bond was not, according to the statute, given to indemnify the parish; whereby the same was and is wholly void. Joinder in demurrer.

Richardson, in support of the demurrer, admitted that the 6 *G.* 2. *c.* 31. does not expressly prohibit any other kind of security from being taken than what is there pointed out; but such a conclusion follows from the provisions and policy of the act of parliament. The policy of the act was to provide for such securities being given as should be strictly within the meaning of an indemnity to the parish: and by prescribing that as the end, it has in effect negatived any other: and therefore if this bond go beyond an indemnity to the parish, it will be void: and so it was decided in *Cole* v. *Gower* (*a*). Now here the bond does not appear to have been framed with reference to the indemnity of the parish; for the payment is not to cease in the event of the child's death or it's ceasing to be chargeable to the parish; both which are essential stipulations in the condition of such an indemnity bond: but it is to continue until the child is deemed capable of providing for herself; which is an object perfectly collateral to the indemnity of the parish. 2dly, At all events the condition to pay until the child is *deemed* capable is indefinite; it should have been until the child is capable.

Lord ELLENBOROUGH C. J. If a duty be imposed by statute, the parties who are called upon to execute that

(*a*) 6 *East*, 110.

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duty must comply with its provisions; and therefore if the defendant had been apprehended under the statute, and had given this bond in order to relieve himself from commitment, there might have been much weight in the argument; but the argument does not apply where the parties are not acting under the statute. This does not appear to be any thing more than a voluntary obligation entered into by the defendant with the object of providing for the maintenance of his child; and if we do not find that it is contrary to the general policy of the law, which was the case of *Cole* v. *Gower*, I see no reason why it should not have effect. The defendant still remains liable to indemnify the parish. Then looking to the obligation it amounts to this, that the putative father of an illegitimate child is willing to pay to the parish officers a reasonable sum every three months until his child is deemed capable of providing for herself. I see nothing in this against general policy, and I have before said it does not seem to me to be a case within the statute. Then the words "deemed capable" must be intended to mean until she shall be so deemed by a jury, which is sufficiently certain.

LE BLANC J. If the party is brought before a magistrate then the statute directs what shall be done; but here the party acts without any compulsion.

Per Curiam, Judgment for the Plaintiff.

DAVIDSON and Another *againſt* WILLASEY (*a*).

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Where a ſhip was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of freight, to be paid at one month from the diſcharge of her cargo at *Liverpool*; and the ſhip owners effected a valued policy on the freight at and from *Jamaica* to her port of diſcharge in the United Kingdom; and the ſhip arrived at *Jamaica*, and after taking on board one half of her cargo, was loſt by ſtorm, the remainder of her cargo being on ſhore and ready to be ſhipped: Held that the aſſured were entitled to recover as for a total loſs.

ACTION on a policy of aſſurance on freight, valued at 4000*l.*, upon the ſhip *St. Andrew*, "at and from any port or ports in *Jamaica* to her port of diſcharge in the United Kingdom." The loſs declared on was by perils of the ſea. There were alſo the uſual money counts. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Trinity* term a verdict was found for the plaintiff for the whole amount of the defendant's ſubſcription, ſubject to the opinion of the Court on the following caſe:

The plaintiffs were owners of the ſhip, and in *June* 1811 chartered her to Meſſrs. *Horſfall* and *Hodgſon* for a voyage from the port of *Liverpool* (where ſhe was then lying) to the iſland of *Jamaica*, there to take in a full cargo of *Weſt India* produce for *Liverpool* or *London*, at the option of the charterers. The charterers covenanted that they would cauſe the veſſel to be full laden at *Jamaica* with ſuch goods as aforeſaid, and would pay freight at the average and current rate of freight from *Jamaica* to *Liverpool* or *London*, at the end of one month from the diſcharge of the cargo. The amount of the full freight according to the rate ſtipulated in the charter-party would have exceeded the ſum inſured. The ſhip arrived at *Jamaica*, and took on board one half of her homeward cargo; and goods ſufficient to have fully loaded her were on ſhore ready to be ſhipped, and would have been ſhipped within the limited time; but two days before it expired

(*a*) This caſe was argued at Serjeants Inn.

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pired the veſſel was ſtranded and wholly loſt by the perils of the ſeas; and no freight has been earned by the plaintiffs. If the loſs on the policy is total, the plaintiffs have not been paid: but if it is a partial loſs, they have already received it from the defendant.

The queſtion for the opinion of the Court is, whether the plaintiffs are entitled to recover a total loſs. If they are ſo entitled, the preſent verdict is to ſtand; otherwiſe a nonſuit to be entered.

Littledale, for the plaintiffs, relied upon the authority of *Montgomery* v. *Eggington* (*a*), *Thompſon* v. *Taylor* (*b*), and *Horncaſtle* v. *Suart* (*c*), as governing the preſent caſe, and eſpecially the two latter, which were not materially diſtinguiſhable from it; the only difference being, that there the loſs happened before any part of the homeward cargo was ſhipped; here ſome part had been put on board: and yet in the firſt of thoſe caſes, which was upon a valued policy, and in the other, which was upon an open policy, the Court held the underwriters liable as for a total loſs. The caſe of *Forbes* v. *Aſpinall* (*d*), where the policy was held only to cover the freight upon ſuch part of the cargo as was on board at the time of the loſs, is obviouſly diſtinguiſhable; inaſmuch as in that caſe there was no charter-party or contract under which the ſhip-owner, except for the perils inſured againſt, would have been entitled to demand freight: but, as Lord *Ellenborough* C. J. obſerved, he could claim freight only for goods actually ſhipped; the ſhip was a mere ſeeking ſhip, and it was uncertain whether any additional cargo would ever have been procured; and if it had been ready, ſhe was not in a condi-

(*a*) 3 *T. R.* 362. (*b*) 6 *T. R.* 478.
(*c*) 7 *Euſt*, 400. (*d*) 13 *Eaſt*, 323.

tion

tion to have received it on board. That deciſion, therefore, does not at all interfere with the caſes relied upon.

Richardſon, contrà. The plaintiffs have a right to be indemnified againſt loſs ariſing by perils of the ſeas; and no farther: and the queſtion is, whether this can be ſaid to be a total loſs ariſing from that cauſe, or only a loſs *pro tanto*, in proportion to the freight which would have accrued from that part of the cargo which was on board. The caſe of *Forbes* v. *Aſpinall* decided that queſtion; for there the freight which was accruing at the time of the loſs was a very minute portion of the whole; and the Court held that the plaintiff was only entitled to an indemnity to that extent. It is true there was no charter-party in that caſe, and that in this, one does exiſt; but notwithſtanding this difference, the reaſoning there adopted applies. The exiſtence of a charter-party does indeed advance the expectation of the ſhip-owner one ſtep farther than where none ſuch exiſts: but it does not ſecure to him the full freight at all events, if he be not prevented by the perils of the ſeas. Other events may interpoſe to prevent it, as the neglect or refuſal of the charterers to ſupply a cargo, and ſuch like, for which he would only be entitled to recover damages for the loſs of freight, but not freight; which is only due upon the arrival of the cargo. *Blakey* v. *Dixon* (*a*). So that here it cannot be aſcertained whether the plaintiffs would have received their full freight ſuppoſing the loſs had not intervened. If therefore they can recover in this action for a total loſs, they will be indemnifying themſelves not only againſt actual loſs

(*a*) 2 *Boſ. & Pull.* 321.

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by perils of the ſeas, but againſt all other caſualties which might by poſſibility have occaſioned a diſappointment in their expectations under the charter-party.

Lord ELLENBOROUGH C. J. The intereſt intended to be inſured was the freight which the aſſured would have earned under the terms of the charter-party, if the voyage had not been ſtopped by the perils inſured againſt; which has been held for upwards of 20 years paſt to be an inſurable intereſt as freight. Then the queſtion is, whether the aſſured were in the proſecution of that intereſt ſo as to have acquired an inchoate right to the freight at the time when the loſs happened. We cannot allow any weight to the arguments uſed to prove that they were not, without ſetting aſide the caſes of *Thompſon* v. *Taylor*, and *Horncaſtle* v. *Suart*, which are preciſe upon this point: and there ſeems to be no reaſon for diſturbing them. The diſtinction between this caſe and *Forbes* v. *Aſpinall* has been truly ſtated, and is a clear one: there, there was no charter-party, and the valuation on the policy was made with reference to freight upon all the goods intended to be carried on the voyage inſured, a part only of which goods was loſt, and the reſt never were or might have been obtained; ſo that the loſs was not total within the meaning of the valuation: but here the valuation is made with reference to the freight under the charter-party, the whole of which the plaintiffs have been prevented from earning by one of the perils inſured againſt. The loſs therefore is total within the meaning of the policy.

GROSE J. I have no doubt but that the caſes already decided upon this point are right; and therefore we ought to abide by them.

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LE BLANC J. The prior caſes determined that in the caſe of a freight policy, where the aſſured has entered into a contract for freight, under which, except for the wrongful act of the party with whom he has contracted, he would be in a condition to earn his freight, if the voyage were not ſtopped by a peril inſured againſt; there if the voyage has commenced in which the freight is to be earned, and be ſtopped by any of thoſe perils, the aſſured will be entitled to recover to the full amount. In the caſe of *Forbes* v. *Aſpinall* it was attempted to carry the prior caſes farther, and to make the underwriter liable for a total loſs, where there was no contract under which the aſſured could have demanded freight, and where ſeveral contingencies might have intervened to deprive the party of his full freight if the loſs had not happened.

BAYLEY J. I am of the ſame opinion. The queſtion is, to what extent the aſſured have been damnified by one of the perils inſured againſt; for to that extent they are entitled to an indemnity. It appears to me that they muſt be conſidered either as having loſt the benefit of taking on board a full homeward cargo, which would have entitled them to their full freight under the charter-party; or of fixing the freighters, if they had refuſed to complete their loading, with damages to the amount of the full freight; and I conſider that the ſame as freight.

Judgment for the Plaintiffs.

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WILLIAMS *againſt* The LONDON Aſſurance Company (*a*).

Action on a policy on ſhip at and from *London* to the *Eaſt Indies*, until her arrival at her port of diſcharge *on the outward voyage*. Loſs by perils of the ſeas. Ship was chartered from *London* to the *Eaſt Indies*, there to deliver her outward cargo and return thence with a cargo for *England* into the *Thames*, and there make a true delivery, &c.; and it was agreed that the charterers ſhould, upon condition that the ſhip performed her voyage and arrived at *London*, and not otherwiſe, pay freight *for every ton of goods that ſhould be brought home* at ſo much per ton; the ſhip ſailed on the voyage inſured, and in the courſe of her outward voyage incurred an average loſs, but was repaired and afterwards performed her voyage, and the freight was received: Held that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in reſpect of ſuch contribution.

DEBT on a policy of aſſurance on the ſhip *Dorſetſhire*, valued at 6000*l.*, on a voyage at and from *London* to *Madeira*, the *Cape of Good Hope*, and all or any the ports or places in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere on this or the other ſide of the *Cape*, until arrived at her laſt port of diſcharge *on the outward voyage*. The loſs declared upon was by perils of the ſea. The defendants pleaded the general iſſue, and paid 2300*l.* into court. At the trial before Lord *Ellenborough* C. J., at the *London* Sittings after laſt *Trinity* term, a verdict was found for the plaintiff for 141*l.*, ſubject to the opinion of the Court on the following caſe:

By charter-party, of the 3d of *September* 1810, the plaintiff and *R. Williams* the younger, as part-owners, on behalf of themſelves and the reſt of the owners, chartered the ſhip to the *Eaſt India* Company, for a voyage from *London* to ſuch ports in the *Eaſt Indies*, or within the limits of the Company's trade, as the Company ſhould direct; and it was agreed, in conſideration of the ſum of 3000*l.* by the Company to be impreſt or paid to the ſaid part-owners, &c. at the ſhip's arrival at *Graveſend* outwards, in part of the freight and demurrage to grow due in reſpect of the intended voyage, &c. that the ſhip

(*a*) This caſe was argued at Serjeants Inn.

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ſhould take on board in her outward voyage a cargo not exceeding 913 tons, and ſhould deliver the ſame at the conſigned port; and there alſo take in any other cargo, and deliver the ſame at any other port, and ſo from port to port as the Company or their agents ſhould direct; and finally return from her laſt loading port with a cargo for *England*, into the river *Thames*, within the port of *London*, and there make a right and true delivery into the Company's warehouſes, &c. The charter-party alſo ſtipulated for the allowance to the Company, either by payment or deduction out of the freight and demurrage payable to the owners, at the rate of 5*l.* for every ton of the 913 tons which ſhould be tendered by the Company and not taken on board; and that the Company ſhould allow to them at the ſame rate for every ton exceeding 913. And as touching the freight to be paid or allowed by the Company, it was agreed that the Company ſhould, *upon condition that the ſhip performed her voyage and arrived at* London *in ſafety*, and the part-owners and maſter performed the covenants on their part to be performed, and not otherwiſe, pay to the part-owners in *London*, at the times thereafter mentioned, and not before or otherwiſe, freight *for every ton of goods that ſhould be brought home* in the ſaid ſhip for account of the Company to the port of *London*, except the privilege goods of the maſter, officers, and ſhip's company, not exceeding 73 tons, as follows: "that is to ſay, [here followed a ſpecification of the rates per ton according as the goods ſhould be loaded at the different ſettlements of the Company,] and ſo for any greater or leſs quantity than a ton, to be computed as aforeſaid. And it was alſo covenanted that if any of the goods that ſhould be laden on board the ſhip in her outward voyage ſhould be loſt or not delivered at the

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the ſhip's conſigned port or ports; in ſuch caſe the part-owners ſhould pay, or, at the election of the Company, allow to the Company out of the freight and demurrage to grow due, the full prime coſt of ſuch goods ſo loſt or not delivered, together with 30*l.* for every 100*l.* on ſuch prime coſt; but that no ſuch payment ſhould be made if there happened to be an utter and inevitable loſs of the ſaid ſhip and cargo, nor ſhould any other payment be made for ſuch goods as ſhould neceſſarily periſh or be caſt into the ſea in the outward voyage for the preſervation of the ſhip and cargo, than by an average to be borne by the ſaid ſhip, freight, demurrage, and cargo.

In *December* 1810 the ſhip ſailed from the port of *London* on the voyage inſured; and on the 4th of *Jan.* 1811 met with a ſevere gale of wind, in which ſhe loſt her anchor and cables; and was afterwards driven upon a ſand near the *Nore*, and ſuffered conſiderable damage; but with aſſiſtance was got off the ſand, brought back to *London*, and unloaded; and after being put into dock and repaired, ſhe proceeded again upon the voyage inſured; and at the time of the commencement of this action was abſent upon ſuch voyage. The particular average on the ſhip amounted to 960*2l.* 16*s.* 3*d.* The general average amounted to 5742*l.* 10*s.* 9*d.* The ſhip arrived in the *Thames* upon her return from the *Eaſt Indies* in the latter end of *October* 1812, with a homeward cargo on board, ſhipped on account of the Company, and at the time of the trial was in *Long Reach* in the *Thames*, but had not arrived at her moorings, or in a ſituation to deliver her homeward cargo.

The queſtion for the opinion of the Court is, whether the freight payable under the charter-party is to contribute to the general average. If the Court ſhall be of opinion

opinion that it ought not to contribute, the verdict is to ſtand: if otherwiſe, a nonſuit is to be entered.

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Taddy, for the plaintiff, maintained the negative of the queſtion propoſed; and, 2dly, ſuppoſing the freight ought to contribute, ſtill the defendants are not entitled to the benefit of ſuch contribution; 1ſt, The homeward freight is not liable to contribute to a general average incurred on the outward voyage. The voyage out and home is diviſible by the terms of the charter-party, and the homeward freight does not become payable until the completion of the homeward voyage. Suppoſe then that this average had been adjuſted (as it might have been) immediately upon the loſs happening and the ſhip's return to its lading port; or that this action had been brought immediately after the loſs; there were no means of apportioning the freight for the outward voyage (*a*), and there was not any homeward freight due or even growing due upon which contribution could have attached; for the whole was at that time in expectancy, and would not be payable unleſs the ſhip arrived at the port of her final deſtination (*b*). How then could the underwriter have ſet up any ſuch deduction at that time? But without reſorting to ſuch a caſe, and taking it that this average was ſettled according to the uſual cuſtom (*c*), upon an eſtimate made at the ſhip's port of outward deſtination, the difficulty is preciſely the ſame; becauſe the freight was payable upon the homeward voyage; the reſult of which being at that time uncertain, the freight was

(*a*) 1 *New R.* 242. *Atty* v. *Lindo, per Mansfield* C. J.

(*b*) 7 *T. R.* 381. *Cook* v. *Jennings*. 8 *Eaſt*, 437. *Smith* v. *Wilſon*. 10 *Eaſt*, 378, *Hunter* v. *Prinſep*. *Ibid.* 516. *Liddard* v. *Lopes*.

(*c*) *Molloy*, tit. *Aver. ſ.* 15.

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alſo unaſcertained. It does not remove this difficulty to anſwer that the voyage out and home would, for ſome purpoſes, be conſidered as entire; and that if this had been a policy upon the freight, an inception of the outward voyage would have given the plaintiff an inchoate right to the homeward freight, ſo as to have entitled him to recover it from the underwriter, and that this was ſo determined in *Thompſon* v. *Taylor* (*a*), *M'Kenzie* v. *Shedden* (*b*), and *Horncaſtle* v. *Suart* (*c*). All this may be admitted without prejudice to the plaintiff, becauſe it does not apply, inaſmuch as this is an inſurance upon the ſhip, and not on the freight. But, 2dly, Whatever may be the conſtruction of the charter-party as to the entirety of the voyage, it is quite clear that the defendants cannot avail themſelves of it; becauſe by the terms of their policy they have expreſsly made the voyage diviſible, if it were not already made ſo by the charter-party. The policy is not in this caſe coextenſive with the charter-party, but is upon the outward voyage only, and the riſk is to ceaſe on the ſhip's arrival at her outward deſtination; and therefore the underwriters cannot claim the benefit of contribution from a ſubject-matter which accrued after the termination of their riſk.

Richardſon, contrà. The only queſtion is, to what extent is the aſſured in this caſe entitled to indemnity at the hands of the underwriters: which depends upon this, viz. how far the loſs which has happened became a charge upon the owner of the ſhip; for if he be recouped in damages by the contribution of other parties, or be liable to contribute himſelf in a ſeparate character from

(*a*) 6 *T. R.* 478. (*b*) 2 *Camp. N. P. C.* 431. (*c*) 7 *Eaſt*, 400.

that

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that of owner of the ſhip; ſo far his claim to indemnity will be reduced, and the underwriters at liberty to take advantage of ſuch reduction: becauſe they have only contracted to indemnify him againſt loſs as ſhip-owner, and not as owner of the freight. The things liable to contribute to general average are the ſhip, the goods which properly compoſe the cargo, and the freight (*a*); which in different countries contribute in different degrees; but in this, to the full value of the ſhip and freight, after deducting certain incidental expences; and this is reaſonable, for the freight is as much preſerved to the owner as the ſhip or the goods. Here the plaintiff, as freight-owner, was in the courſe of earning his freight under the charter-party at the time when the loſs happened; and there is no longer any uncertainty as to the event, ſince he has actually received the freight at this time. (This was admitted on the other ſide.) The plaintiff therefore has been benefited by the repairs done to the ſhip to the whole amount of his freight, which has been thereby preſerved to him. As to the argument that it was uncertain at the time of the loſs whether any freight would be earned, the ſame might be urged in every caſe of contribution, where the loſs happens in the courſe of the voyage; in the caſe of goods, it is uncertain what value is to be put upon them until the ſhip arrive at her deſtination; and yet it cannot be diſputed that goods are contributory. Neither does it make any difference in this caſe that the charter-party is upon a voyage out and home. Suppoſe it had been limited to the outward voyage, what greater degree of certainty would there have been, at the time of the loſs, of the ſhip's earning freight? If, as has been ſuppoſed, the contribution had been adjuſted before

(*a*) 2 *T. R.* 407. *Da Coſta* v. *Newnham.*

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the freight was earned, it must have been done upon an assumption that the voyage would be completed and the freight earned; and then if this action had been brought, the defendants would still have had the benefit of it: but the plaintiff would have had no right, by bringing his action prematurely, to oust them of that benefit. Then as to the voyage being divisible by the charter-party, it is true that the freight is to be calculated upon the homeward cargo; but that is only a mode of calculating the whole returns payable as freight for the use of the ship out and home. The whole freight is entire under the contract, and according to the cases cited and not disputed, the ship was in the course of earning it on the outward voyage. If then the freight be contributory it operates to the extent of that contribution as an indemnity to the ship-owners; and it matters not that the policy, under which the defendants claim to deduct to that extent, is not coextensive with the charter-party under which the contribution is made; because the underwriters are entitled to avail themselves of an indemnity from whatever source that indemnity may arise. [Lord *Ellenborough* C. J. Does it signify at what time the freight is made payable; whether immediately, or at the termination of the voyage, or on a contingency as here; when paid must it not contribute to an average, but for which, it would have been wholly lost; and will not such contribution operate in reduction of the damages? The principle of *Godsall* v. *Boldero* (*a*) seems to govern this.]

Taddy, in reply, took this distinction between *Godsall* v. *Boldero* and this case, that there the indemnity received

(*a*) 9 *East*, 72.

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ceived was to the full amount, so that the whole subject-matter of the insurance was gone, and there was no subsisting cause of action: whereas here a cause of action still subsists, and the underwriters only set up a partial indemnity. But although the ship-owner, if he receive contribution, may perhaps be chargeable in equity as a trustee for the underwriter, it is no answer to an action at law; and the circumstance of the ship-owners in this case being also freight-owners will not vary the law. [Lord *Ellenborough* C. J. If the freight-owners are liable to contribute to themselves as ship-owners, I think we must intend that they will pay themselves.

Lord ELLENBOROUGH C. J. This is the case of an insurance on the outward voyage, on a ship chartered for a voyage out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter-party is liable to contribute to general average. It is contended that the whole freight out and home is not liable: but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution: and the difficulty as to the outward and homeward voyage seems to be re-

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moved by the conſideration that the whole freight was ſaved by the repairs. In *Godſall* v. *Boldero* it was reſolved that a contract of inſurance being a contract of indemnity, if the damage likely to reſult from the loſs was obviated, the foundation of any action on the ground of ſuch inſurance was gone: and that the ſource from which ſuch indemnity was derived, was immaterial.

LE BLANC J. The ſtreſs of the argument for the plaintiff is this, that the contribution was uncertain at the time of the loſs. But in all caſes of contribution to general average freight cannot at the moment of the loſs be received, and therefore the contribution muſt be always uncertain; and yet in *Da Coſta* v. *Newnham* freight was determined to be contributory. It is therefore not a deciſive argument againſt its being contributory that the thing does not exiſt in certainty at the time of the loſs. The next argument is, that this inſurance is not coextenſive with the charter-party, and that the queſtion is to be taken as if the underwriter had been called upon for his indemnity at the time when the voyage inſured ended. But ſuppoſe in this caſe there had been an inſurance upon the homeward voyage, what difference would it have made whether the voyage out and home was inſured. If it is once eſtabliſhed that freight is contributory, the freight ſaved muſt equally contribute to the general average, whether the policy be upon the whole or only part of the voyage.

BAYLEY J. Where part of a cargo is ſacrificed for the preſervation of the reſt, it becomes a ſubject of general average, and all the parties whoſe property is thereby preſerved are to contribute. Here the plaintiff had a

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vested right of freight; he had some freight then actually due, and the whole was put in hazard, and the whole has been ultimately earned. The difficulty raised in argument is this, that a thing is not to contribute unless ultimately saved, and that it was uncertain at the termination of the outward voyage whether the freight would be saved; but this freight was one entire and indivisible sum payable for the use of the ship out and home; therefore when ultimately earned, having been put in hazard and saved, it ought to contribute.

Per Curiam, Judgment of nonsuit.

DOE, on the several and joint Demises of JOHN HENRY ROAKE, THO. WM. ROAKE, GEORGE ROAKE, and ELIZABETH ROAKE, *against* NOWELL. (a)

Tuesday, May 11th.

EJECTMENT for a messuage, and other premises.

Devise of all the testator's freehold estates to *J. S.* for life, and on his decease to and among his children equally, at the age of 21, and their heirs, as tenants in common; but if only one child shall live to attain such age, to such child and his or her heirs, at his or her age of 21; and in case *J. S.* shall die without issue, or such issue shall die before 21, then over: Held that the children of *J. S.* took a vested remainder.

At the trial before Lord *Ellenborough* C. J. at the last summer assizes for the county of *Surrey*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Sarah Trymmer being seised in fee of the premises in question, by her will, dated the 6th day of *June* 1783, after making (amongst other things) a specific bequest to *John Roake*, her nephew and heir at law, directed the remainder of her personal estate not then invested in government funds, *India* stock, or annuities, to be forth-

(a) This case was argued at Serjeants Inn.

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with laid out by her executors in the purchaſe of government ſecurities, and the dividends and intereſt thereof, as alſo of all ſtocks, funds, or annuities which ſhould be ſtanding in her name at her deceaſe, to be from time to time received by them, and paid to her ſaid nephew *John Roake* for his life, and at his deceaſe the whole principal dividends and intereſt of ſuch ſtocks, funds, or annuities to be paid and transferred by her executors to the lawful children of *John Roake*, at the age of twenty-one, equally; but if only one ſhould attain ſuch age, to ſuch only child at ſuch age: and if her ſaid executors ſhould think proper, they were at liberty to apply ſuch part of the dividends and intereſt of ſuch ſtocks, funds, or annuities as their judgment ſhould direct them towards the maintenance and education of ſuch children or child till twenty-one; and if *John Roake* ſhould leave no child or children lawfully begotten at his death, or they ſhould all die before *John Roake*, or the attaining the age of 21, then ſhe gave the whole principal dividends and intereſt of ſuch ſtocks, funds and annuities, to and among her nephews *Miles*, *Thomas*, *John* and *James Pinfold*, and her nieces *Sarah Pinfold* and *Suſannah Longman*, or ſuch of them as ſhould be then living. The teſtatrix then deviſed as follows: "I give and deviſe all my freehold eſtates in the city of *London*, and county of *Surry*, or elſewhere, to my ſaid nephew *John Roake* for his life, on conſideration that out of the rents thereof he do from time to time keep ſuch eſtates in proper and tenantable repair, and on the deceaſe of my ſaid nephew *John Roake*, I deviſe all my ſaid eſtates (ſubject to and chargeable with the payment of thirty pounds a-year to *Ann*, the wife of the ſaid *John Roake*, for her life, by even and quarterly payments,) *to and among his children lawfully*

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fully begotten, equally, at the age of 21, *and their heirs, as tenants in common. But if only one child ſhall live to attain ſuch age, to him or her, and his or her heirs, at his or her age of* 21; *and in caſe my ſaid nephew* John Roake *ſhall die without lawful iſſue, or ſuch lawful iſſue ſhall die before* 21, then I deviſe all the ſaid eſtates (chargeable with ſuch annuity of 30*l.* a-year to the ſaid *Ann Roake* for her life, in manner aforeſaid,) to and among my ſaid nephews and nieces, *Miles*, *Thomas*, *John*, *James*, and *Sarah Pinfold*, and *Suſannah Longman*, or ſuch of them as ſhall be then living, and their heirs and aſſigns for ever." The teſtatrix died on the 4th of *December* 1786, without having revoked or altered her will, leaving *J. Roake*, the deviſee, her heir at law, her ſurviving. *J. Roake* was then a widower, and had not any iſſue; and on the teſtatrix's deceaſe, he entered upon the premiſes. On the 10th of *May* 1787 he married, and afterwards had the four leſſors of the plaintiff, his only children; and in *Michaelmas* term 1789 levied a fine ſur conuzance de droit, &c. of the premiſes, with proclamations to the uſe of himſelf in fee, in purſuance of a covenant contained in an indenture made on the 5th of *November* in that year. Two of the leſſors of the plaintiff were born before the execution of the indenture and levying the fine above mentioned. In *Trinity* term 1797 *J. Roake* alſo ſuffered a recovery of the premiſes to the uſe of ſuch perſons as he ſhould appoint, and on 21ſt *May* 1802, by deeds of leaſe and releaſe appointed the ſame to the defendant in fee. *J. Roake* was in poſſeſſion of the premiſes, as deviſee under the will at the date of the ſaid indenture and fine, and died on the 13th of *February* 1803, leaving the four leſſors of the plaintiff him ſurviving, being then all infants under the age of twenty-one years. The two firſt leſſors of the

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plaintiff have ſince attained their reſpective ages of twenty-one years, ſubſequently to which and before the date of the demiſes in this ejectment an actual and formal entry was made by the plaintiff's leſſors reſpectively upon the premiſes in queſtion for the purpoſe of avoiding the operation of the fine and recovery.

The queſtion for the opinion of the Court is, What intereſt (if any) the leſſors of the plaintiff, the children of *John Roake*, or any of them, take under *Sarah Trymmer*'s will? and whether the fine or recovery has barred their title?

Marryat for the plaintiff, contended, that under the deviſe "to and among the children of *J. Roake* equally at the age of 21, and their heirs," the leſſors of the plaintiff took a veſted remainder in fee, liable to be deveſted by the contingency of their dying under the age of 21: and ſo he ſaid it was reſolved in ſeveral caſes; viz. in *Boraſton's caſe* (*a*), in *Edwards* v. *Hammond* (*b*); and in *Bromfield* v. *Crowder* (*c*), in the two latter of which, the words founded more in contingency than in the preſent caſe; for the word *if*, which was there uſed, is primâ facie a word of condition (*d*): and yet it was held in the one which was a ſurrender, and in the other which was a deviſe, to *J. S.* in remainder if he ſhall live to attain 21, that *J. S.*, who was then an infant under 21, took a veſted eſtate. And the ſame rule was adopted in *Goodtitle* v. *Whitby* (*e*), and *Doe* v. *Moore* (*f*). And if the Court ſhould hold otherwiſe in this inſtance, the freehold would paſs in a different direction from the

(*a*) 3 *Rep.* 19. (*b*) 3 *Lev.* 132. 2 *Show.* 398. 1 *N. R.* 324. *in notis.*
(*c*) 1 *N. R.* 313. (*d*) *Co. Lit.* 204. (*e*) 1 *Burr.* 228.
(*f*) 14 *Eaſt*, 601.

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perſonal property, which would be manifeſtly againſt the intention of the teſtatrix. Neither was it conſiſtent with her intention of providing for the family of *J. Roake*, that if *J. Roake*, who had no children at the date of the will, ſhould die before any of his children ſhould attain 21, they ſhould be altogether excluded; or that thoſe who had attained that age ſhould take to the excluſion of thoſe who were below it. If that were ſo, then if *J. Roake* had died, leaving 20 children all under the age of 21, the eſtate would notwithſtanding have gone over. Beſides the ultimate limitation over in caſe *J. Roake* ſhould die without iſſue, or ſuch iſſue ſhould die under 21, clearly imports that the limitation was not to take effect until both thoſe events concurred, and therefore if *J. Roake* died leaving iſſue, ſuch iſſue ſhould take, although under 21. It is clear therefore that the intention of the teſtatrix was to give to all the children of *J. Roake* a veſted intereſt, and the circumſtance of their not being born at the time of her death will make no difference, becauſe each would take the moment he came in eſſe; and therefore the words "at the age of 21" ſhall be conſtrued as not importing a condition precedent to the veſting of their eſtate, but a condition ſubſequent, on the failure of which their eſtate ſhall be deveſted; not as a deſcription of the time when the children are to take, but of the time when the eſtate already veſted in them is to become indefeazible. Under this view of the caſe it becomes unneceſſary to notice what the effect of the fine and recovery might otherwiſe have been.

Preſton for the defendant. The ultimate limitations both of the real and perſonal eſtate, which are made to depend upon *J. Roake*'s dying without children, or ſuch

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children dying under 21, are clearly contingent; and therefore ſhew that the teſtatrix contemplated contingencies. And ſo it is with reſpect to the prior limitation to the children of *J. Roake*; and there is no need for a difference of conſtruction as to the deviſe of the real and perſonal eſtate. What would create a contingency in the one will do ſo in the other. Thus a legacy to *A. when* or *at* 21 is clearly contingent; although if it be given to *A. to be paid* at 21, it is not ſo (*a*); becauſe that is conſtrued as debitum in præſenti ſolvendum in futuro. The ſame rule applies to real eſtate; therefore a deviſe to a woman when ſhe ſhall marry (*b*), or to *J. S.* when he came to the age of 25 years (*c*), has been holden to be contingent. Now here the queſtion is, whether the teſtatrix intended that the children ſhould have the remainder immediately, or whether the words which refer to the age do not import that they muſt arrive at that age before they can take. If they do, then the deſtruction of the particular eſtate before the time of the remainder veſting, will prevent its veſting at all. This queſtion is not determined by *Bromfield* v. *Crowder*, becauſe here the deviſe is not ſimply "to the children at 21," which would then have reſembled that caſe, but it goes on, "but if only one child ſhall live to attain ſuch age, to that one child at 21:" ſo that taking the whole together, it is in ſubſtance a gift to ſuch child or children upon condition of attaining 21. It is deſcriptive of the character in which the children muſt ſtand before they can take; not an immediate gift to the children as they are born, but to ſuch child only as ſhall attain 21; and if it is contingent as to any one

(*a*) *Burr.* 227. per Ld. *Mansfield.* (*b*) *Sir T. Ray.* 82. S. C. 1 *Sid* 153.
(*c*) 10 *Rep.* 50. *Grant's caſe.* *Cro. Eliz.* 122. *Johnſon* v. *Gabriel.*

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child attaining 21, it must be so to all, for it cannot first vest in all the children, and then be devested, so as to give it to such child as shall attain 21. As to *Boraston*'s case, and the other cases that have been cited, they all turned upon the intention of the testator as it was collected in each particular case, and therefore cannot govern the present: but the intention must first be ascertained, and when once that is done, it is easy to apply the rule of law. Looking then to the words of this will, the fair import of them seems to be this, that the children should not take until they attained 21, and the devise being coupled with a bequest of the personalty in the same terms, the rule noscitur a sociis will apply. In *Doe* v. *Scudamore* (*a*), and *Denn* v. *Bagshaw* (*b*), the words were held to create contingent remainders.

Marryat in reply. A devise to a person when he shall marry, is contingent; but a devise to a man when he shall attain 21, cannot be shewn by any case to make a condition precedent; but the contrary has been shewn by several cases. The rule respecting bequests of personal estate is borrowed from the civil law, and does not apply to devises of land, or bequests of legacies chargeable on land, in which cases the adverbs "when or at" do not amount to a condition precedent. As to the distinction taken between this case and *Bromfield* v. *Crowder*, it has no foundation; the devise there was to an individual if he should live to attain 21, which is the same as the devise here to one child, if only one should live to attain that age; the meaning of which is, that the attaining that age whether by one or more shall preclude the subsequent limitation. *Doe* v. *Scudamore* was clearly

(*a*) 2 *Bos. & Pul.* 289. (*b*) 6 *T. R.* 512.

a case

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a case of contingent remainder; but Lord *Eldon* there said, that a condition is to be construed to be precedent or subsequent according to the intent of the testator. Here it is apparent what that intent must have been.

Lord ELLENBOROUGH C. J. I think this case concluded by *Bromfield* v. *Crowder*; which was very fully considered. That was a devise in remainder of all the testator's estate to *J. D. Bromfield*, if the said *J. D. B.* should live to attain the age of 21, but in case *J. D. B.* died under 21, and *C. Bromfield* should survive him, then over: and it was resolved that *J. D. Bromfield* took a vested estate determinable upon the contingency of his dying under 21. After that decision came the case of *Doe* v. *Moore*, which was an immediate devise of the testator's real estate in fee to *J. Moore*, when he attained the age of 21, but in case he died before 21, then to his brother, &c.: and there it was held that *J. Moore* took a vested estate. So that it appears whether the devise be in remainder or an immediate devise, there is no substantial distinction. Here the words of the devise, after the decease of *J. Roake*, are to and among his children equally at the age of 21, but if only one child shall live to attain such age, to such child at the age of 21; and in case *J. Roake* shall die without issue, or such issue shall die before 21, then over. I see nothing in this devise to distinguish it from the above cases. The consequence is that the children must be considered as taking vested remainders.

Per Curiam, Postea to the Plaintiff.

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MULLER and Another, Aſſignees of MEEK, a Bankrupt, *againſt* Moss. (*a*)

Thurſday, May 11th.

TROVER for pictures, prints, houſehold furniture, and farming ſtock, &c. Plea, general iſſue.

At the trial before *Le Blanc* J., at the ſpring aſſizes 1812, for the county of *Lancaſter*, a verdict was found for the plaintiffs, damages 1112*l.* 17*s.* 6*d.*, ſubject to the opinion of the Court on the following caſe:

On the 22d of *Nov.* 1810, *Meek* (who was at that time a broker at *Liverpool*, in partnerſhip with one *Gill*,) by agreement of that date, made between himſelf and the defendant, agreed with the defendant, on payment to him of 9500*l.*, to ſurrender to the defendant, his heirs and aſſigns, a dwelling-houſe and land, being copyhold of the manor of *Waventree*, then in *Meek*'s poſſeſſion, and lately purchaſed by him from one *Bolton*, together with the additional buildings, and to convey to him and deliver up poſſeſſion of a pew in the church, and alſo all the houſehold furniture and ſtock enumerated in the ſaid agreement, and to be compriſed in an inventory to be made by *J. S.* on behalf of the defendant, for whom *J. S.* ſhould take poſſeſſion, and to be ſigned by *Meek; and it was agreed that* Meek *ſhould afterwards be allowed to remain in poſſeſſion for three months* without payment of rent, he engaging to uſe carefully, and to deliver up the ſame in good order; and that the defendant ſhould pay to *Bolton* the balance due to him from *Meek* on the original purchaſe, and the remainder of the purchaſe-money in acceptances of Meſſrs. *Meek* and *Gill*, or bills indorſed by them, if the defendant held ſo much,

Where, by agreement between *B.* and the defendant, *B.* agreed, on payment to him of a ſum certain, to convey to the defendant a dwelling-houſe, and to deliver poſſeſſion of all the houſehold furniture and ſtock, and that after formal poſſeſſion delivered to the defendant, *B.* ſhould be allowed to remain in poſſeſſion for three months without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and *B.* afterwards left in poſſeſſion according to the agreement, who became bankrupt whilſt he ſo remained in poſſeſſion, and before the expiration of the three months: Held that this was not a poſſeſſion by the bankrupt within the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 11.

(*a*) This caſe was argued at *Serjeants' Inn.*

and

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and the remainder in good bills or cash; the whole to be calculated as cash of the present time; *Meek* to deliver an abstract of the title at his expence."

The agreement was signed on the day of the date, and the transfer was notorious in the neighbourhood and on the Exchange at *Liverpool* the day after it took place. On signing the agreement the defendant paid to *Meek*, in acceptances of *Meek* and *Gill*, and in bills which had their indorsement, 6847*l.* 5*s.* 11*d.*; which, with the balance of the purchase-money due to *Bolton*, and subsequently paid to him by the defendant, (which proved to be greater than the parties at first had calculated,) amounting to about 3200*l.*, exceeded the sum that the defendant was to pay under the contract by several hundred pounds. On the 27th of the same month of *November*, *J. S.* (mentioned in the agreement) met the defendant and *Meek* on the premises, for the purpose of making an inventory and taking formal possession of the purchased property for the defendant; which he accordingly did, and, in pursuance of the agreement, left *Meek* in possession of the whole premises except the wine-cellars, of which, after taking out a certain quantity of wine, by the desire of the defendant, for the consumption of *Meek* during his permitted residence in the house, the defendant received the keys, and has had them in his custody ever since. *Meek* continued in possession of the house, furniture, premises, and stock, pursuant to the agreement, until his bankruptcy, which took place within the three months, on the 24th *December* following. When the defendant was informed of the bankruptcy he sent a person to take possession, on his behalf, of all the property contracted for, and has kept possession of the same ever since. The assignees of *Meek* demanded the

furniture, pictures, prints, and ſtock, from the defendant, which he refuſed to deliver; and ſince the bankruptcy the aſſignees have conveyed the houſe to the defendant, purſuant to the agreement. The queſtion for the opinion of the Court is, whether the plaintiffs are entitled to recover. If the Court ſhould be of that opinion, the preſent verdict to ſtand: if of the contrary opinion, the verdict is to be entered for the defendant.

Littledale contended, that the plaintiffs were entitled to recover, this being ſuch a poſſeſſion by the bankrupt as fell within the ſtat. 21 *Jac.* 1. *c.* 19. *ſ.* 11. The property originally belonged to the bankrupt, and was ſuffered to remain in his poſſeſſion after a conveyance of it to the defendant; ſo that the caſe falls within the preamble, as well as the enacting clauſe, of the ſtatute, and does not admit of a doubt, which was formerly entertained, but ſince has been ſettled (*a*), whether the words of the preamble did not reſtrain the enacting clauſe. But it is fair to conclude that a caſe which is within the preamble is a fortiori within the meaning of the act. Then the bankrupt, by remaining in poſſeſſion by permiſſion of the true owner, became reputed owner, and gained a falſe credit, the miſchief ariſing from which the ſtatute was intended to obviate.

Lord ELLENBOROUGH C. J. It was a part of the contract that the bankrupt ſhould remain in poſſeſſion during the three months; therefore, during that period he was in of his own right, as owner, and not by permiſſion of the true owner; and as to his being reputed

(*a*) *Mace* v. *Cadell*, *Cowp.* 232.

owner,

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owner, the case states that the transfer was notorious. No person was deceived. Besides, reputed ownership is a fact, which ought to have been found to raise the question at all. It might have been a very different thing, if the bankrupt had retained the possession without its being a part of the contract.

Per Curiam, Postea to the Plaintiff.

Scarlett was for the defendant.

Tuesday, May 11th.

BAYLY and Others, Assignees of LUCKRAFT, a Bankrupt, *against* SCHOFIELD and Another.

Where a trader, upon being arrested for a debt of 135*l.*, escaped from the officer and fled into the house of another, and was pursued by the officer and inquired for at the house, but was denied and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber: Held that this constituted one or more act or acts of bankruptcy, under the words of the statute, "beginning to keep house," or "otherwise absenting himself;" and a creditor of the bankrupt, who had sued out a writ against him, and, without proceeding upon it, afterwards received from him a bill of exchange in part-payment of his debt, after being apprised that there had been a meeting of his creditors, and that the bankrupt's affairs at that time were only capable of paying the demands of his creditors by instalments, although he was assured by the bankrupt's agent that they would come round, was liable to refund the proceeds of such bill to the assignees of the bankrupt, as a payment not in the usual course of trade, and before notice of his insolvency.

THIS was an action for money had and received, tried at the *Lent* assizes for the county of *Devon*, 1812, before *Chambre* J., when a verdict was found for the plaintiffs for 425*l.*, subject to the opinion of the Court on the following case:

On the 27th of *February* 1810, *Luckraft* being then a trader at *Plymouth*, and indebted to the defendants in the sum of 284*l.* for goods sold, the defendants drew a bill of exchange upon him of that date for the amount, payable at six months, which *Luckraft* accepted, but did

not

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not pay when due. On the 1st of *June* following, *Luckraft* being then farther indebted to the defendants in the sum of 562*l.* 12*s.* 9*d.* for other goods, sent them a bill of exchange of that date drawn on *Harrison* for the last-mentioned sum, at five months, which bill not being accepted, the defendants' attorney wrote to *Luckraft* on the 26th of *July*, calling on him for payment, and desiring the amount to be remitted by return of post to prevent his farther interference. On the 9th of *August*, *Luckraft* being then indebted to the defendants and several other persons, particularly to one *Henry Wills*, in the sum of 135*l.*, was arrested at his suit, and taken by the officer who arrested him to a public house in *Plymouth*, at his own desire, but escaped from the officer at the door of the house. He was immediately pursued by the officer, but fled from him into the house of another person, into which the officer was certain that he entered, and enquired for him there, but he being denied by some one within the house, and the door kept fast, the officer did not break it open, but departed and did not see *Luckraft* afterwards, but the money for which he was so arrested was paid within three or four hours after by *Luckraft's* attorney. Afterwards on the same day *Luckraft* was seen by a person at the house whither he fled in a two pair of stairs room, to whom he said that he had been arrested on that day, and the debt was paid, but that he remained there for fear of being opposed by some other creditors. When it was dark he went home to his own house, and gave directions to deny him to any body that called, and from that time he continued nearly a month in his bed-chamber, except coming down on *Sundays* for a little air. On the 11th of *August* a commission of bankrupt issued against *Luckraft*, but it appearing afterwards to the

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the parties who ſued it out that his property was far more than ſufficient to pay all his debts, and that he only required time, it was not proceeded upon, but advertiſements were publiſhed in two of the public newſpapers for convening a meeting of his creditors on the 31ſt of *Auguſt*, which was accordingly held, when it was unanimouſly reſolved by the creditors preſent, that *Luckraft*, with the aſſiſtance of his attorney, ſhould forthwith advertiſe all his lands for ſale, diſpoſe of all his other effects as ſpeedily as adviſeable, collect all monies due to his eſtate, and divide the ſame proportionably amongſt his creditors as the proceeds ſhould come to hand. *Luckraft* and his attorney accordingly proceeded to carry this reſolution into effect; by advertiſing the land and getting in as much of the property as poſſible, with which many payments were made to creditors in proportion to their reſpective debts. On the 22d of *Auguſt Luckraft's* attorney wrote a letter to the defendant's attorney, upon the ſubject of his letter to *Luckraft* of the 26th of *July*, demanding payment of the draft for 562*l.* 12*s.* 9*d.*, when he apprized him of the above advertiſements in the newſpapers, calling a meeting of the creditors on the 31ſt inſtant, and requeſted the defendants to depute ſome friend to attend that meeting on their behalf, ſtating that he hoped then to make it appear that *Luckraft's* debts were about 10,000*l.*, and his effects worth 14,000*l.*, and to obtain a licence for a few months to arrange his affairs, and pay every one 20*s.* in the pound. The letter alſo ſtated that *Luckraft's* principal property conſiſted in houſes, all of which were more or leſs incumbered, and that the great difficulty or delay in ſettling his affairs would be in converting this property, as houſes in *Plymouth* were then really a drug,

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a drug, but that every ſtep would be taken to get rid of them, even at a ſacrifice, in order to wind up the matter. On the 2d of *September* following *Luckraft*'s attorney not having heard from the defendants' attorney, wrote to the defendants as follows: " So long ſince as the 22d *ult.* I " replied to your ſolicitor in anſwer to a letter which " my client, Mr. *Luckraft*, had received on the ſub- " ject of the monies due from him to you, and " I ſtated that I had by advertiſement called a meeting " of Mr. *Luckraft*'s creditors in order to lay before them " a general ſtate of his affairs, and as I hoped, and " which proved the caſe, to prove to them that although " he at this time labours under a temporary embarraſſ- " ment, yet that he ſtill is a very ſolvent man. I flattered " myſelf I ſhould have had your ſolicitor's reply, con- " taining your ſentiments on the ſubject before the " meeting, as I had not, I now ſtate to you, the ſitua- " tion of the affairs, and what took place at the meet- " ing, and have great pleaſure in aſſuring you that I " was there enabled, moſt ſatisfactorily, to lay before " them a ſtatement, (a copy whereof I now ſend you,) " which not only gave general ſatisfaction, but drew " from every one preſent (with the exception of one " gentleman, who was a mortgagee in poſſeſſion for " about 700*l.*, and ſaid he could not wait longer,) an " immediate conſent to wait a few months, not exceed- " ing ſix, to enable Mr. *Luckraft* to ſell his eſtates and " convert his other effects, and if neceſſary they would " all agree to execute a deed to that effect, but whether " ſuch will be neceſſary is not at preſent determined. " The cauſe of Mr. *Luckraft*'s embarraſſment is a very " heavy and loſing contract he has had for two years " paſt in the victualling office, to compleat which he

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" has been obliged to take up ſums on mortgage in " all directions. The commiſſioners of the victualling " office have, however, agreed to allow him about " 1000*l.* in part remuneration of his loſſes. The re- " mainder of the 3000*l.*, ſtated to be due to him from " the victualling office will be forthcoming in three or " four months. I am therefore to entreat your conſent " to follow the ſteps of the other creditors, and I have " no doubt but in three or four months, or perhaps " leſs, both you and every other creditor will be fully " paid." In reply to this letter the defendants wrote to *Luckraft*'s attorney on the 6th of *September*, acknowledging its receipt, and ſtating that had *Luckraft*'s conduct to them been that of a fair tradeſman, they would not have heſitated to agree to any meaſures that might be beneficial to himſelf and the creditors, but as it was he could not expect much lenity from them; that they had come to a determination not to ſign any deed of truſt, nor to let the buſineſs ſtand over for ſome months, as requeſted, without ſecurity; that if *Luckraft* could furniſh them with ſuch ſecurity as they might approve, to pay his debt in ſix months from that time, they had no objection to wait ſo long, if not, the law ſhould have its force, and he ſhould hear from them accordingly. *Luckraft*'s attorney replied on the 27th of *September*, that he was ſorry the defendants were not inclined to grant the indulgence requeſted, *that* he *pledged himſelf to them that there was no doubt that* Luckraft *would be able to pay every one in full, and have a very conſiderable balance left*; that he had been informed by his agent in *London*, that the defendants not only refuſed to receive 300*l.* on account, *but threatened arreſt*, he would therefore endeavour to ſend them one half of their debt, or ſay 420*l.*

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by return of poſt, provided they would be content to wait three months for the remainder, by which time he had not the leaſt doubt he ſhould be quite enabled to ſettle with them and every other creditor. By return of poſt *Luckraft's* attorney received a letter from a clerk of the defendants, informing him they were from home, and that his letter of the 27th would be laid before them on their return: the letter added, that more than a week previouſly to his agent's waiting upon them with the 300*l.*, they had taken out a writ againſt *Luckraft*. On the 2d of *October* the defendants' attorney wrote to *Luckraft's* attorney, that if he would remit 420*l.* and the coſts, together with the underſheriff's and officer's charges by return of poſt, with *Luckraft's* note payable in *London* at three months for the balance and intereſt, they would accept it, that this offer was made, and muſt be accepted without prejudice to the defendants, if not complied with immediately. On the 11th of *October Luckraft's* attorney replied that he had been abſent from home, and was only juſt returned, ſince which he had been endeavouring, if he could, to raiſe ſufficient caſh of *Luckraft* to remit the 420*l.* and coſts, but had not been able to muſter quite ſo much, having been obliged to pay every one a little as it came to hand, and as yet had paid no other creditor any thing like the proportion then incloſed for the defendants, that he had ſet aſide 420*l.*, the produce of a navy bill, hoping it would have ſatisfied the defendants, and induced them not to take hoſtile meaſures, but of this ſtep they were to judge, and although he regretted the expences of an original writ, he at the ſame time thanked them for ſtaying proceedings. The letter then went on thus, "I now incloſe you Meſſrs. "*Symons* and Co.'s draft on *Stephenſon* and Co. for

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"425*l.*, which is the moſt I can at this time muſter, "and I declare to you I have not the ſmalleſt doubt that "within three months, from this time, I ſhall have ſuf- "ficient caſh paſs through my hands to be able to re- "mit you the full balance, and therefore ſhall conſider "you will not preſs us to incur the additional heavy ex- "pences of ſpecial bail during the next term, as I have "not a ſhadow of doubt but that e'er *Hilary* term ar- "rives your clients will be fully paid." The incloſed bill was dated the 11th of *October* 1810, payable thirty days after date, and was indorſed to the defendants, and the value for which it was drawn was part of the produce of *Luckraft*'s eſtate, received by his attorney on his account, and paid by him to the drawers of the bill on the day of its date, as a conſideration for the ſame, for the purpoſe of remitting it on *Luckraft*'s behalf to the defendants. It was received by the defendants on the 13th of *October*, and was paid to them when due. On the 13th of *October* the defendants' attorney wrote to *Luckraft*'s attorney, deſiring him to ſend the note required in his former letter for the balance of the debt and coſts, and intereſt then due, as well as for the three months the note would have to run, upon doing which, and paying the officer's charges, the buſineſs would be ſettled. To this *Luckraft*'s attorney replied on the 16th of *October*, that he could not ſend him the note payable in *London*, as required, but had incloſed him *Luckraft*'s promiſſory note for 456*l.* 12*s.*, being the amount of the balance for principal and intereſt on both the bills of exchange, calculated to the 11th of *January* next, when the note would become due, and he requeſted him to return the bills of exchange, in lieu of which the incloſed note was ſent. The letter further

ſtated that he had calculated the intereſt on the bill for 562*l.* 12*s.* 9*d.* from the day it was drawn, according to his ſuggeſtion, though in ſtrictneſs no intereſt was due thereon till it became due, for it might be paid then, although acceptance had been refuſed; that he hoped, however, if it was regularly paid (as he expected), that the defendants would make ſome allowance to *Luckraft* on account of intereſt and coſts. In purſuance of this letter the defendants' attorney returned the two bills. At the trial *Luckraft*'s attorney was examined for the plaintiffs, and on croſs-examination ſtated that at the time the bill of the 11th of *October* was paid to the defendants, he aſſured them that *Luckraft* was a ſolvent man; that he believed him to be ſo, and thought he would come round; and that under that repreſentation the money was paid. On the 10th of *December* 1810 the former commiſſion of bankrupt iſſued againſt *Luckraft* was ſuperſeded, and another commiſſion dated on that day was iſſued againſt him on the petition of his attorney, to whom he was indebted in 700*l.*, (as was admitted in the outſet of the argument, before the 9th of *Auguſt*,) under which commiſſion he was duly declared a bankrupt, and the plaintiffs afterwards choſen aſſignees, and this action is brought by them to recover the ſaid ſum of 425*l.*, as money had and received by the defendants to their uſe as ſuch aſſignees.

The queſtions for the opinion of the Court are, 1ſt, Whether under the above circumſtances *Luckraft* committed an act or acts of bankruptcy before the defendants received the ſaid 425*l.*: 2dly, Whether the ſaid 425*l.* was under the above circumſtances really and bonâ fide, and in the uſual and ordinary courſe of trade

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and dealing, received by the defendants of *Luckraft* before such time as they knew, understood, or had notice that he was become a bankrupt, or was in insolvent circumstances. If the Court shall be of opinion in the negative upon the first question, or in the affirmative upon the second, then the verdict is to be set aside and a nonsuit entered, otherwise the verdict is to stand.

Bayly for the plaintiffs, contended upon the 1st question, that *Luckraft* committed an act of bankruptcy on the 9th of *August*, by escaping from the custody of the officer, taking refuge in the house of another, and being there denied, whilst the doors were kept close. This he said was a "beginning to keep house" within the words of the stat. 1 *J.* 1. *c.* 15. and it makes no difference that the house where he was denied was not the house of the bankrupt; for in a case cited by *Buller* J. in *Colkett* v. *Freeman* (*a*), the denial was at the house of a friend; and yet Lord *Mansfield* held it would be sufficient to constitute an act of bankruptcy. The house in which the bankrupt shuts himself upand is denied, may be considered as his house for the time. And in like manner it was resolved in *Holroyd* v. *Gwynne* (*b*), that a trader by departing from a mere temporary residence committed an act of bankruptcy. [*Bayley* J. That was holden an act of bankruptcy under another branch of the statute, viz., "otherwise absenting himself."] At all events there was a "beginning to keep house," from the time that the bankrupt returned home and gave directions to be de-

(*a*) 2 *T. R.* 59. (*b*) 2 *Taunt.* 176.

nied,

nied, and afterwards continued ſhut up in his own houſe for nearly a month. An actual denial to a creditor is not neceſſary; if the trader ſecludes himſelf to avoid the importunity of his creditors, that will be ſufficient, according to Lord *Ellenborough* C. J. in *Dudley* v. *Vaughan* (*a*). So in *Robertſon* v. *Liddell* (*b*), and *Williams* v. *Nunn* (*c*), it was held that if a trader depart the realm, or from his dwelling-houſe, with intent to delay his creditors, thoſe are acts of bankruptcy without proof of any actual delay. And the ſame doctrine holds as to "a beginning to keep houſe," becauſe it ſatisfies the words, "to the intent or whereby his creditors may be delayed," which refer to all the other acts of bankruptcy before enumerated. 2dly, The payment was not in the ordinary courſe of dealing, neither was it before ſuch time as the defendants had notice of the bankruptcy or inſolvency of *Luckraft*: 1ſt, It was not in the ordinary courſe of dealing, inaſmuch as the bill which was given in payment of the goods was renewed by another bill, which included intereſt from the day when the firſt bill was drawn, inſtead of the day when it became due; *Vernon* v. *Hale* (*d*), *Pinkerton* v. *Marſhall* (*e*), and *Bradley* v. *Clarke* (*f*). With reſpect to the defendants having notice of the inſolvency, the whole correſpondence ſhews that they had notice that the bankrupt's property was under ſuch embarraſſments, that although ultimately it might prove ſufficient, yet at the time it was unable to liquidate his debts: which is the very meaning of inſolvency. As to the belief of the bank-

(*a*) 1 *Camp. N.P.C.* 272.
(*b*) 9 *Eaſt*, 487.
(*c*) 1 *Taunt.* 270.
(*d*) 2 *T.R.* 648.
(*e*) 2 *H.Bl.* 334.
(*f*) 5 *T.R.* 197.

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rupt's attorney, it could have no weight when oppoſed to the facts which were communicated to them.

Burrough, contrà. Neither of the acts relied upon as acts of bankruptcy, fall within the meaning of the words "beginning to keep houſe." As to the firſt it does not appear that the denial to the officer at the houſe to which *Luckraft* fled, was made in conſequence of any directions given by him; and as to the ſecond, although when he returned to his own houſe he gave directions to be denied, it is not ſtated that any creditor called, ſo that there was no actual denial, which is the uſual evidence of a beginning to keep houſe. Nor have the words of the ſtatute "otherwiſe abſenting himſelf," been extended to a caſe like the preſent. The other queſtion which turns upon the 19 *G.* 2. *c.* 32. is perhaps more properly a queſtion of fact than of law: that the debt was originally contracted in the ordinary courſe of trade there can be no doubt; and according to the caſes of *Calvert* v. *Lingard*, *Holmes* v. *Wennington* (*a*), and *Cox* v. *Morgan* (*b*), the payment may be conſidered ſo alſo; for it was a payment by compulſion, and as ſuch protected by the ſtatute. And although in *Cox* v. *Morgan*, *Chambre* J. differed from the other Judges, yet he admitted the authority of the preceding caſes.

Bayly in reply. In *Cox* v. *Morgan* the creditor uſed due legal diligence in obtaining his debt, by commencing an action againſt the bankrupt and arreſting him, and that was the point on which the deciſion turned.

(*a*) 2 *Boſ. & Pul.* 399. *n.* (*b*) 2 *Boſ. & Pul.* 398.

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No such diligence was used in this case, but on the contrary, time was given for payment, and interest taken by way of premium for the indulgence. That decision therefore does not apply; and in *Hovil* v. *Browning* (*a*), Lord *Ellenborough* C. J. said that if that case had been the same as *Cox* v. *Morgan* he should have inclined to the opinion of *Chambre* J.

Lord ELLENBOROUGH C. J. There are two points in this case referred to the consideration of the Court. The first, whether *Luckraft* committed an act of bankruptcy on the 9th of *August* 1810. The facts respecting that point are these; that *Luckraft* was arrested upon process against him and taken to a public house, but escaped and fled from the door to another house, where he was denied, but not by his orders; and therefore that circumstance should not be pressed. He remained however in the house until dark, intending to delay his creditors. I think this was not a departing from his dwelling-house, but that it was emphatically an absenting himself within the words of the statute. Then comes a second act; when dark he returned home, the next day gave orders to have himself denied, and there continued nearly a month in his chamber. Indeed it has not been much contended that the act of bankruptcy is not made out. The next question, and the most important one, is, whether the payment by *Luckraft* was a payment bonâ fide and in the usual and ordinary course of trade, within the 19 *G.* 2., before such time as the defendants had notice that he was become bankrupt, or was in insolvent circumstances. It may be admitted that they did not

(*a*) 7 *East*, 162.

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know that he was a bankrupt, but how does the caſe ſtand with reſpect to their knowledge of his being in inſolvent circumſtances? By inſolvent circumſtances is meant that a perſon is not in a condition to pay his debts in the ordinary courſe, as perſons carrying on trade uſually do. Looking at the letter of the 11th of *October* which incloſed the bill, it emphatically ſhews him to have been in inſolvent circumſtances. It ſpeaks of his being unable to muſter a ſufficient ſum, and of his having been obliged to pay every one a little as it came to hand. Can that payment then be ſaid to be in the ordinary courſe, when a man confeſſes he is obliged to pay by minute portions to each of his creditors? It is more like a diſtribution under a deed of compoſition, than a payment by a trader appearing openly at his counter. I ſhould ſay that this was not the mode in which a ſolvent man proceeds. But we have been preſſed by arguments to ſhew that this is a caſe where legal diligence was uſed to enforce payment. That caſe has been ſo much conſidered, and decided by ſo many Judges, that I ſhould be ſorry to ſay any thing which might ſeem to caſt a doubt upon it. But it is an exception, and may be conſidered as an anomalous caſe. I do not lay much ſtreſs on the circumſtance of paying intereſt, becauſe a man who is ſolvent may very fairly pay intereſt; as for inſtance, where goods are ſold upon credit, and the money not paid until after the time of credit is run out, intereſt may be paid for ſuch time as the credit has been exceeded. I therefore do not think the circumſtance of paying intereſt weighs much on one ſide or the other; it does not import inſolvency except as far as the not paying at the proper time may be deemed a circumſtance of inſolvency. What I principally rely on is the actual ſtate of incapacity to pay except in ſmall portions,

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portions, by muſtering as much as could be raiſed out of the ordinary courſe. In *Southey* v. *Butler* (*a*), where a trader who was detained in priſon for debt, ſent for his creditors and paid them all in full except one, it was held that ſuch payment was not in the ordinary courſe. Neither do I think this was: here the debts were not paid in full; and although I do not rely on the payment of intereſt, yet it is an ingredient to ſhew it not in the ordinary courſe. With reſpect to the opinion of *Luckraft's* attorney, that he believed him to be ſolvent, and that he would come round, the very term "come round" imports that he was not then ſolvent; beſides if it were otherwiſe, his belief can have no weight when oppoſed to the letters.

GROSE J. I am of the ſame opinion. There were clear acts of bankruptcy committed on the 9th of *Auguſt*, and on the following day, by the bankrupt's ſecreting himſelf within his own houſe. With reſpect to his being in inſolvent circumſtances, it is true indeed that the attorney ſtated that he believed otherwiſe, but his letters upon that ſubject pronounce judgment againſt himſelf, ſhewing that the bankrupt was infinitely diſtreſſed. As to the money having been paid in the uſual and ordinary courſe of trade, I cannot ſay that money paid by driblets by a perſon who felt himſelf to be inſolvent was ſuch a payment. Then as to the knowledge of the party who received the money, looking at the correſpondence, it is impoſſible to doubt whether he was ignorant of it.

LE BLANC J. This is an action brought by the aſſignees of *Luckraft* againſt the defendants to recover

(*a*) 3 *Boſ. & Pull.* 237.

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from them a ſum of money which they received as the produce of a bill remitted to them by the bankrupt after his bankruptcy. The firſt queſtion is, whether a previous act of bankruptcy had been committed; and then comes the queſtion, whether the money was paid in the ordinary courſe of trade, and before the party who received it knew of the inſolvency. With reſpect to the act of bankruptcy the facts are theſe; on the 9th of *Auguſt Luckraft* was arreſted, but eſcaped to the houſe of another, where he ſhut himſelf up, ſo that the officer arreſting could not get acceſs to him. He ſtaid there during the remainder of the day expreſſing his fears of encountering other creditors. When dark he returned home, and gave directions to be denied, and confined himſelf nearly a month in his bedchamber, with exception of *Sundays*. There was no evidence of any actual denial, but a denial is not one of the acts of bankruptcy enumerated in the ſtatute. It has indeed been received as concluſive evidence, if unexplained, of an act of bankruptcy, by beginning to keep houſe; but it is not the only evidence by which an act of bankruptcy may be eſtabliſhed. It may be proved alſo by evidence of his abſenting himſelf, or of his keeping his houſe with intent to delay his creditors; as in this caſe, when upon his return home, he explained his motives for ſhutting himſelf up in his bedchamber. There is no doubt therefore that upon one or both of theſe grounds an act of bankruptcy was committed. That brings it to the next queſtion, whether the payment was protected as being a payment in the ordinary courſe of trade, and without knowledge of his inſolvency. I ſhould feel great difficulty in ſaying that this was in the ordinary courſe. The defendants were creditors upon a bill of exchange, which being diſhonored,

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honored, they applied for payment, and afterwards ſued out proceſs, but did not enforce it by arreſting *Luckraft*, but commenced and continued a correſpondence from the 22d of *Auguſt* to the 16th of *October*, and on the 13th of *October* received the bill in queſtion in part payment of their debt. During that period the bankrupt's attorney was in the courſe of informing them of the ſituation of his affairs. The queſtion is, whether he was not then inſolvent. I take inſolvency as it reſpects a trader to mean that he is not in a ſituation to make his payments as uſual; and that it does not follow that he is not inſolvent, becauſe he may ultimately have a ſurplus upon the winding up of his affairs. The letter of the 22d of *Auguſt* refers to the advertiſement in the newſpapers reſpecting the bankrupt's affairs, and reſpecting a meeting of his creditors, ſo that on that day the defendants were apprized of thoſe circumſtances. That information was followed up by an account of what paſſed at the meeting. The defendants ſtill go on until the 13th of *October* without inforcing their demand by ſervice of proceſs, and are in that interval informed that the bankrupt is paying money to his creditors in driblets. They then receive the bill in queſtion for part of their debt. I find great difficulty therefore in ſaying that this was a payment in the ordinary courſe of trade. There is much greater difficulty however in ſaying that the defendants did not know *Luckraft* to be inſolvent. They were from time to time informed of his affairs; and the only expectation of his ſolvency that was held out to them, aroſe from a ſpeculation of diſpoſing of his houſes to advantage; and the opinion of his attorney only amounted to this, that by management his affairs would come round; but that does not make a man who is unable to pay his creditors at the time a ſolvent man.

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Kingdon, made a reaſonable requeſt to the defendant to execute an indenture between the defendant of the firſt part, the plaintiff of the ſecond part, and *Samuel Anſtice* of the third part, intended to be a releaſe of the premiſes for ſuffering a common recovery for the better aſſuring and confirming the premiſes to the uſes mentioned in the deed; and tendered the ſame to the defendant for execution, but the defendant refuſed to execute. The defendant demurred to the firſt and ſecond breaches, aſſigning for cauſes that they are aſſigned too generally, and are not ſufficiently preciſe and certain, and that it does not appear that *R. Kingdon* ſuſtained or could have ſuſtained any damage by the ſaid breaches of covenant, or either of them, nor that he was at any time interrupted or diſturbed in his enjoyment of the premiſes conveyed to him by the defendant; nor that the ſaid *Elizabeth* has or claims any intereſt in the premiſes, or that ſhe is heir at law, or aſſignee of the ſame, or any part thereof. He demurred alſo to the laſt breach, aſſigning for cauſes, that it does not appear that the ſaid *Elizabeth* hath or claims to have any intereſt in the premiſes, as aſſignee or otherwiſe, of *R. Kingdon*, nor to what perſon, or for whoſe uſe the deed of releaſe was intended to enure, or why or for what reaſon *Samuel Anſtice* was made a party thereto, nor that the ſaid deed of releaſe was a reaſonable conveyance or aſſurance in that behalf: and alſo for that the ſaid laſtmentioned breach of covenant cannot by law be joined in the ſame declaration with the other breaches of covenant in the ſaid declaration aſſigned: and alſo for that the ſaid declaration as to the ſaid breach of covenant laſtly aſſigned is in various other reſpects inſufficient, informal, and defective. Joinder.

Gifford

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Gifford in ſupport of the demurrer, took two grounds of objection, which went to the whole declaration. Firſt, that the executrix cannot maintain an action on this covenant; but the heir ſhall have it or the aſſignee of the land. Secondly, ſuppoſing this action maintainable, there is a miſjoinder; the two firſt breaches aſſigned being breaches which accrued in the time of the teſtator; the laſt in the time of the executrix. Upon the firſt point, which was the principal one, he ſaid that there were two ſorts of covenants, viz. real or ſuch as are annexed to and run with the land, and theſe deſcend to the heir, and he alone ſhall take advantage of them; and 2dly, covenants perſonal, of which the perſonal repreſentative ſhall take advantage. The preſent falls within the former deſcription of covenants; for notwithſtanding the proviſo for redemption, this conveyance is in ſubſtance a conveyance in fee; and the covenant for title and farther aſſurance is annexed to the land, and will paſs to the heir or the aſſignee of the land. And although the covenant be with *R. Kingdon* alone, without naming his heirs, ſtill if it run with the land it ſhall go to the heir, although he be not named; *Lougher* v. *Williams.* (*a*) Then if in breach of this covenant a good title be not made, the heir, after the death of the anceſtor, is thereby damnified, and conſequently he is the perſon entitled to ſue, and not the executrix; for that would be converting real into perſonal aſſets. In *F. N. B.* 145. C. it is laid down thus: "If a man make a covenant by deed to another and his heirs, to infeoff him and his heirs of the manor of *D.*, now if he will not do it, and he to whom the covenant is made dieth, his heir ſhall have a writ of

(*a*) 2 *Lev.* 92.

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covenant upon that deed." And this is very material to the preſent queſtion, becauſe the principle to be deduced from it is this, that notwithſtanding there be not any conveyance of the land to which the covenant may be annexed, but the whole reſts in covenant merely; yet when it is a covenant which regards the inheritance, it ſhall enure to the benefit of the heir. And the caſe there put carries the principle farther than the preſent caſe requires, where there is a conveyance of the inheritance with which the covenant will run. The ſame doctrine will be found in *Shepherd's Touchſtone*, 171. "If a feoffment be made in fee, and the feoffor doth covenant to warrant the lands, or otherwiſe, to the feoffee and his heirs; in this caſe the heir of the feoffee ſhall take advantage of this. As if *A.* covenant with *B.* and his heirs to infeoff *B.* and his heirs of land, and *B.* die before it be done, in this caſe his heirs ſhall take advantage thereof." [Lord *Ellenborough*, C. J. It ſays the heirs ſhall, but it does not ſay the executor ſhall not. Suppoſe an action brought by the heir, and then by the executor, what plea could the defendant plead? Is there any caſe which negatives the right of the executor.] No caſe has been found to that effect: but in *Bacon's Abr.* (*a*) it is ſaid, that covenants real deſcend to the heir, and he alone ſhall take advantage of them. It is farther laid down in *Shep. Touch.* 171. that "if *A.*, *B.*, and *C.* have lands in coparcenary, and purchaſe other lands in fee, and covenant each to the other, his heirs and aſſigns, to make ſuch conveyance to the heir of him that ſhall die firſt, of a third part, as he ſhall deviſe: in this caſe the heir, not the executor, ſhall take advantage

(*a*) *Bac. Abr.* tit. *Covenant*, E.

of

of the covenant." And this seems to have been the case of *Wootton* v. *Cooke* (*a*), where it was so adjudged on error, notwithstanding it was objected that the heir could not have an action as heir, except in respect of a right, or thing descended from his ancestor, and not when nothing descended, as in that case; for there (as it was said) the action was not brought to recover any thing descended, nor any inheritance, but damages only: but it was resolved by all the justices that the heir should have the action, for that the intent of the covenant was to have the inheritance conveyed to the heir, and if that covenant had been performed, the heir would have had the advantage of whatever by the performance of the covenant would have accrued to him, and therefore he should have the damages which accrued by the non-performance of the covenant." The same argument applies immediately to this case. Then it may be further objected, that if this action be maintainable by the executor, an executor might recover damages even to the full value of the land; and such damages would become a part of the personal assets, and be distributable as such; and then the heir might also bring an action, and it would be difficult for the defendant to frame a plea which would be a bar to such action; for how could he plead a former recovery by the executor of damages which would be personal assets, to satisfy the damages accruing to the heir by the breach of covenant? Then the covenant as set out in the declaration is with *R. Kingdon* alone, without naming his executors; so that the plaintiff has not even a color for bringing this action: for if the executor had been named, it might have been said that he was a party to the covenant, although even then, according to the case of

(*a*) *Anders.* 53.

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Lougher v. *Williams*, the heir would ſtill have been the perſon entitled to maintain the action; but now that he is not named he is neither privy in contract nor in intereſt. At the common law the heir or executor of a man ſeiſed of a rent ſervice or rent charge, &c. in fee or in tail had no remedy for the recovery of the arrearages incurred in the lifetime of the owner of ſuch rent; the heir could not maintain debt for them, for he had nothing to do with the perſonal contracts of his anceſtor; and the executor could not, becauſe he did not repreſent his teſtator as to any contracts relating to the freehold and inheritance; but this is remedied by ſtat. 32 *H.* 8. *c.* 37. (*a*) Now change only the above inſtance of rent into the covenant in this caſe, and it will be found that there is the ſame reaſon here why the executor ſhould not maintain this action. He was then proceeding to the ſecond ground of objection, when *Bayley* J. inquired whether if the laſt breach was badly aſſigned it would operate as a misjoinder: to which it was anſwered, that a bad count in a declaration may nevertheleſs be cauſe of misjoinder. But the Court ſaid, that then the demurrer for cauſe of misjoinder ſhould have been to the whole declaration, and not as here to the laſt breach of covenant only; and upon this the argument proceeded no farther.

Bayly contrà, admitted the laſt breach could not be ſupported, for the reaſons aſſigned in the demurrer, (and the Court agreed to that); but upon the principal point he urged, firſt, that this was only a mortgage, and not a conveyance of the inheritance: but the Court ſaid that they would look to it as a conveyance of the fee, ſubject to a

(*a*) *Co. Lit.* 162, *a*. *Fac. Abr.* Debt. C.

power

power of redemption, which had not been exerciſed. He then contended that no caſe had been cited for the defendant, in which upon the ſame covenant as the preſent, the executor has been held not competent to ſue: but many caſes are to be found, where upon ſimilar covenants, actions have been permitted to be maintained by him. Thus the caſe of *Lucy* v. *Levington* (*a*), (which is alſo an anſwer to another part of the argument, that the executor is not named in the deed,) decided that the executors, although not named, might ſue upon a covenant for quiet enjoyment made with their teſtator, and the reaſon given was becauſe they repreſent the perſon of their teſtator. [*Bayley* J. There was another reaſon alſo for that deciſion, viz., that unleſs the executors could ſue in that caſe, no other perſon could, becauſe the teſtator having been evicted in his life-time, it was ſaid that he could not have heirs or aſſigns of that land.] Here alſo there was a breach of the covenent (for it was broken as ſoon as made,) in the teſtator's life-time, and the damages ariſing from it could not deſcend; and therefore the executor is the only perſon who can ſue for them. And this is commonly allowed to be done by the executor upon covenants for not repairing. In both caſes the breach of covenant at the very time of its commiſſion, renders the eſtate of leſs value in the hands of the teſtator than it would otherwiſe have been; it would ſell for a leſs price: therefore this was an immediate damage to the teſtator, and although it is ſaid that now it has become the damage of the heir alone, non conſtat that his anceſtor may not have compenſated him in ſome other way for ſuch deterioration of the eſtate. In

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(*a*) 2 *Lev.* 36. 1 *Ventr.* 175. *S.C.*

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Lucy v. *Levington* it is true there was an eviction, but that is not neceſſary to conſtitute a breach of covenant for good title; in *Salmond* v. *Bradſhaw* (*a*), there was no eviction, but the breach aſſigned was, that the defendant had not full power to demiſe; and it was holden to be well aſſigned. [*Bayley* J. Here if it had been alleged that the teſtator was prevented from ſelling, perhaps the executor might have maintained the action.] The covenant is alleged to have been broken in the life-time of the teſtator, and in the laſt cited caſe it was held that where the covenant is general, the breach may be aſſigned as general as the covenant. [Lord *Ellenborough* C. J. The covenant, it is true, was broken, but there was no damage ſuſtained in the teſtator's life-time. It has been a ſort of maxim in the law, that an executor ſo far repreſents his teſtator, as to be entitled to maintain an action in reſpect of all perſonal contracts made with the teſtator, and broken in his life-time: but from *Co. Litt.* and the other authorities which have been cited, it ſhould ſeem that in contracts relating to the freehold, the executor does not repreſent his teſtator quite to that extent. And if the preſent action could be maintained, this inconvenience would certainly reſult from it, that the executor who could recover only nominal damages, would thereby preclude the heir, who is the party actually damnified, from recovering at all; for I am not aware of any caſe in which an action has been holden to be maintainable by the heir, after a former recovery by the executor.] As to the caſe of *Wootton* v. *Cooke*, there was not any breach, as in this caſe, in the life-time of the teſtator.

(*a*) 9 *Rep.* 60. *b. Cro. Jac.* 304. *S. C.*

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Gifford in reply. In the case of *Lucy* v. *Levington*, which indeed has already received an answer, there was an eviction alleged in the life-time of the testator, and nothing passed to the heir. Here, for any thing that appears to the contrary, the land has descended to the heir. The question then is, whether the executor who has shewn no damage is to recover in exclusion of the heir who is damnified, or whether both may recover against the defendant. No authority has been shewn for that, and it would be novel to hold that two actions may be maintained on the same breach of covenant.

Lord ELLENBOROUGH C. J. This is a case in which a person may have formed his opinion from what is to be found in a book of very excellent authority, I allude to *Comyns Digest* (*a*), in which it is laid down generally that if a man covenant with *B.* upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the life-time of his testator. But when that position comes to be compared with *Lucy* v. *Levington*, which is the authority there cited in support of it, it will be found not to be borne out by that case in its generality; for in that case there was an eviction in the life-time of the testator, and therefore the damages in respect of such eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor; and nothing descended to the heir. But in this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and

(*a*) *Com. Dig.* tit. Covenant, *B.* 1.

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there is a difficulty in admitting that the executrix can recover at all, without alſo allowing her to recover to the full amount of the damages for ſuch defect of title; and in that caſe a recovery by her would bar the heir; for I apprehend the heir could not afterwards maintain another action upon the ſame breach. Had the breach here been aſſigned ſpecially with a view to compenſation for a damage ſuſtained in the life-time of the teſtator, and ſo as to have left a ſubject of ſuit entire to the heir, this action might have gone clear of the difficulty, becauſe then it would not operate as a bar to the heir; but framed as it now is, it ſeems to me that it would operate as a bar to his action. It is certainly a new point; and if I thought that more authorities could be found than what have been cited, which, however, from the induſtry of the gentlemen who have argued the caſe, is not very probable, I ſhould have pauſed. But what has been cited from *Co. Litt.*, and the other authorities, that the executor of a perſon who died ſeiſed of a rent could not maintain an action to recover the arrears incurred in the life-time of his teſtator, inaſmuch as he could not repreſent his teſtator as to any contracts relating to the freehold and inheritance, is in a great degree an authority to ſhew that in the preſent caſe the executrix does not ſtand in a ſituation to take advantage of this breach of covenant. Therefore on the principle of what is there laid down, and in the abſence of any damage to the teſtator, which, if recovered, would properly form a part of his perſonal aſſets, I do not know how to ſay that this action is maintainable.

LE BLANC J. This action is brought by the executrix to increaſe the perſonal eſtate of the teſtator. The

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difficulty arises from its being assigned as a breach of covenant in the lifetime of the testator. The breach assigned is in not having a good title. But how is that breach shewn to have been a damage to the testator. It is not alleged that the estate was thereby prejudiced, during the lifetime of the testator; and if after his decease any damage accrued, that would be a matter which concerns the heir. The distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor. Now this is a covenant on which after one breach has been assigned and a recovery had thereon, the party cannot again recover. It is not like a covenant for not repairing, for a breach of which damages may be recovered now, and again hereafter, and so toties quoties; although even in that case there is always a difficulty in apportioning the damages. But here no breach from which a damage accrued to the testator is stated at all. Yet the action is brought to increase the personal estate, which belongs to the executor; when the estate itself, such as it is, has come to the heir.

BAYLEY J. The testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant, she would be recovering damages to be afterwards distributed

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tributed as perſonal aſſets, for that which is really a damage to the heir alone; and yet ſuch recovery would be a complete bar to any action which the heir might bring. The caſe of *Lucy* v. *Levington* ſtruck me as a ſtrong authority for the defendant: becauſe in that caſe it appears there was an actual damage accruing to the teſtator by the eviction, whereby he was deprived of the rents and profits during his life, and of courſe the perſonal eſtate was ſo far damnified. There, as I have before obſerved, if the executor could not have ſued, no other perſon could, becauſe the teſtator having been evicted, there could be no heir of the land, and that was given as a reaſon why the action was holden to be maintainable.

Per Curiam, Judgment for defendant.

Wedneſday, May 12th.

LUNN *againſt* LEONARD.

Where the plaintiff in error within four days after being ruled to put in better bail, viz. on the day after *Hilary* term gave notice that he ſhould juſtify the ſame bail on the firſt day of the enſuing term, and two days before the firſt day of that term gave notice of freſh bail: Held that the latter bail were not entitled to juſtify, there being no reaſon aſſigned for the non-attendance of the former bail.

WALFORD oppoſed the juſtifying of bail in error, on the ground of irregularity. Within four days after the allowance of writ of error, viz., on the 8th of *February* 1813, plaintiff in error gave notice of bail. On the next day defendant ruled him to put in better bail. On the 13th of *February* plaintiff in error gave notice that he ſhould juſtify the *ſame* bail on the firſt day of the enſuing *Eaſter* term, viz., on the 5th of *May*. On the 3d of *May* he gave notice of *freſh bail* for the 1ſt day of *Eaſter* term. This caſe came before the Court on that day, when *Le Blanc* J., (then the only Judge in court,) directed that it ſhould ſtand

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over, in order that the practice might be looked into and ſettled.

Walford now contended, that the terms of the rule for better bail not having been complied with within four days after the ſervice, the bail ought not to be permitted to juſtify; that the object of the rule was, that the party ſhould declare within a reaſonable time the bail upon which he intended to rely, which object would be defeated if this practice was allowed. The defendant in error would, during the whole vacation, be without real ſecurity, as merely nominal bail might be put in, whom both parties might know to be inſolvent, and whom the plaintiff in error never intended to juſtify; and that it would virtually amount to giving the plaintiff in error the whole vacation to find bail. He relied on *Oſtreich* v. *Wilſon* (*a*), which was before the Court on *Monday*

(*a*) OSTREICH and Another *againſt* WILSON.

Monday, *May* 10th.

THIS was a rule calling upon the ſheriff of the town and county of *Kingſton-upon-Hull*, to pay over to the plaintiffs or their attornies 438*l.* 11*s.* 9*d.*, levied by him under an execution at the ſuit of the plaintiffs. Final judgment was ſigned on a day in laſt *Trinity* vacation, on which day notice was ſerved on the plaintiff's agent of the allowance of a writ of error, and bail was put in within the time allowed. The defendant's attorney was ruled to put in better bail, of which no notice was taken until the 2d of *November*, when notice was given by the defendant's attorney that two perſons would add themſelves and juſtify on the 1ſt day of *Michaelmas* term, and on that day the bail appeared for that purpoſe, but were not permitted by the Court to juſtify on its being repreſented that the defendant had not complied with the rule for better bail, neither would the Court give leave to bring the money into court to abide the event of the writ of error. On the 6th of *November* a teſtatum fi. fa. was iſſued to the ſheriff, to which he returned in the laſt term that he had levied and had the money.

Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the 1ſt day of the term: the Court would not permit the bail to juſtify.

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Monday last, and said that there was not any material distinction.

E. Lawes contrà, referred to *Hickley* v. *Hutton* (*a*), *B. R.*, *Hil.* 27 *Geo.* 3., as in point.

Barrow, who shewed cause, contended that by the practice of this Court, if a rule for better bail be served in vacation, there was no occasion to justify until the next term, and he cited *Tidd's Prac.* 1121. and the case in the text which was then pending.

Littledale contrà, relied upon the circumstance of the added bail having been rejected by the Court.

LE BLANC J. said the case alluded to differed from this; for there the party did give notice within time that he should justify the same bail, but before the bail could justify on the first day of the following term, gave notice of other bail, so that there he complied with the rule in part.

Lord ELLENBOROUGH C. J. observed that in that case there was a compliance, and the only question was whether a substitution afterwards is allowable.

Per Curiam, Rule absolute.

(*a*) The facts in this case, (as appeared from a MS. note by Mr. *G. Wilson*,) were these: within four days after writ of error allowed, plaintiff in error gave notice of bail. Defendant ruled him to put in better bail: and plaintiff, within four days after this rule served, gave notice that he should justify the same bail the first day of the term. After the four days he gave notice of fresh bail for the same day.

Shepherd contended, that this notice should have been within four days, and that the Court was more strict in bail in error. But *Buller* J. said, no case had been cited, and the principles were the other way, and defendant in error had suffered no prejudice, for the bail could not have been justified sooner, and he had sufficient time to enquire. *Shepherd* mentioned a case in *Barnes* 211. as applicable; but *Buller* J. said, however that case might be, the practice of the *C. P.* was different, and would not be an authority here. Bail allowed.

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LE BLANC J. (the only Judge in court.) This case having been before the Court on a former day, I have had an opportunity of conferring with the other Judges, who agree with me in thinking, that the bail in question ought not to be permitted to justify. The principle with respect to bail in error, and bail on mesne process is different. As to bail in error the defendant in error is allowed 20 days to except against the bail put in, and the mode of exception is by serving the plaintiff in error with a rule for better bail. The terms of the rule are, "that unless the plaintiff in error puts in better bail within four days, execution will issue." The object then of the rule is, that the execution should not be delayed, unless security is given for the debt. In this case the party has no bail to the sheriff, as on mesne process; he has not any security whatever, except the bail in error. If, therefore, the practice now insisted on were to prevail, the defendant in error would remain from the end of one term to the beginning of the next, with merely nominal security; whereas the meaning of the rule for better bail is that the party shall put in such better bail as he will abide by, unless indeed they are prevented from justifying by special circumstances, which must be disclosed by affidavit at the time appointed for justifying. It is reasonable that the rule should be relaxed to this extent, as it is easy to conceive many circumstances under which good bail, of whom notice has been given some months ago, may not be able to attend in order to justify. The Court therefore will always be open to receive an affidavit, setting forth a sufficient excuse for their non-attendance; but this is the utmost extent to which this rule ought to be relaxed.

Bail rejected.

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Wednesday, May 12th.

The KING *against* The Inhabitants of BURBACH.

Where the father of the pauper contracted with *J. S.* that his ſon ſhould be with him, and ſhould work with him for two years, and have what he got, and ſhould allow 2*s.* per week out of his gains to *J. S.* viz. 1*s.* for teaching him the buſineſs of a frame-knitter, 9*d.* for the rent of a frame, and 3*d.* for the ſtanding: Held that this was a contract of hiring and ſervice, and not an apprenticeſhip; and that the ſon's having ſerved under it was evidence that he had adopted the contract made by his father; and therefore he was entitled to a ſettlement by ſuch hiring and ſervice.

THE Court of quarter ſeſſions for the county of *Leiceſter*, diſcharged an order for the removal of *Mary* the wife of *William Timpſon*, and her infant child, from the pariſh of *Burbach* to the pariſh of *St. Mary*, *Birmingham*, ſubject to the opinion of this Court on the following caſe. The pauper's huſband was born at *Birmingham*, where his father was legally ſettled. The pauper's huſband being then unmarried, and having no child, his father made a verbal agreement with one *Richard Palmer* of *Burbach*, in the county of *Leiceſter*, frame-work-knitter, that his ſon ſhould be with him (*Palmer*) and ſhould work with him for two years, and have what he got, and that he ſhould allow two ſhillings per week out of his gains to *Palmer*, viz. one ſhilling for his (*Palmer's*) teaching him the buſineſs of a frame-work-knitter, nine-pence for the rent of a frame, and three-pence for the ſtanding of the frame. Nothing was ſaid about his being an apprentice. The pauper's huſband went and ſerved *Palmer* for two years at his houſe in *Burbach*, and had what he earned after the two ſhillings per week were deducted by *Palmer*, who found a frame and all materials, but the pauper's huſband paid for the needles himſelf; and in regular work he earned about ten ſhillings per week. The pauper's huſband had no right to work for any body elſe in *Palmer's* frame, nor did he do ſo to *Palmer's* knowledge; he received no wages, and boarded and ſlept all the time at the houſe of his father and mother in *Burbach*, where he alſo had his waſhing done for him; and he did not do any act as a ſervant

for *Palmer* by his order; and on *Sundays* he was at his father's house.

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Clarke and *Dayrell*, in support of the order of sessions, contended that the pauper's husband gained a settlement in *Burbach* by hiring and service, and that this was not to be distinguished from the case of *Rex* v. *Little Bolton* (*a*); of which case *Le Blanc* J. in *Rex* v. *Eccleston* (*b*) observed, that it had never been overruled in terms nor in principle, and the Court acted upon it in the latter case, although Lord *Ellenborough* C. J. said, that if it were res integra, he might have thought otherwise. It is true indeed that here it is found that the pauper's husband received no wages; but that only means wages in the ordinary acceptation of the term; for the earnings which he acquired and retained, with the exception of 2*s.* a-week, virtually amounted to wages. Then the case negatives that there was any express mention made of his being an apprentice. *Rex* v. *Laindon* (*c*) is distinguishable; for there a premium was paid.

Reader, *Beauclerk*, and *G. Marriott*, contrà, insisted that there was no contract to bind the son. The agreement, which was a verbal one, was with the father; and although it is true that the son went and served under it, yet nothing is stated to shew that he was originally a party to the contract. [Lord *Ellenborough* C. J. inquired if it was to be contended that the son, as being an infant, was incapable of making a contract; for if it was, an answer was afforded by the case not stating any thing about his infancy. And if it was admitted that he might contract,

(*a*) *Cald.* 367. (*b*) 2 *East*, 298. (*c*) 8 *T. R.* 379.

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then he might alſo adopt a contract made for him.] A mere ſubmiſſion to the ſervice will not amount to an adoption; but it muſt appear that there was a mutual contract between the maſter and ſervant, otherwiſe no ſettlement will be gained. It was ſo reſolved in *Rex* v. *Cheſterfield* (*a*), which caſe only differs in this reſpect, that here the contract was made with the father, there with a perſon ſtanding in loco parentis. [*Bayley* J. The ſeſſions have drawn the concluſion, and ſurely there was evidence to warrant them in ſo doing.] Then as to *Rex* v. *Little Bolton*, Lord *Kenyon*, in *Rex* v. *Laindon* (*b*), regretted that Lord *Mansfield* had not adhered to his firſt opinion in that caſe; and even when it was recognized in *Rex* v. *Eccleſton*, Lord *Ellenborough* C. J. expreſſed a reluctant aſſent to it. But *Rex* v. *Eccleſton* was ſo preciſely ſimilar in all its circumſtances, that without overruling it the Court could not have decided otherwiſe. It is fair then to preſume, after what has paſſed upon that caſe, that it will not be held to govern any other than thoſe within its immediate range. Now here a diſtinction is obſervable, although it muſt be admitted to be a ſlight one; for in that caſe the contract was with the pauper himſelf; and that circumſtance afforded a reaſonable inference that it was a contract of hiring and ſervice, the ſervant himſelf being the perſon who uſually makes ſuch a contract; but here the contract is with the father, who is naturally the party to make a contract of apprenticeſhip. It is ſaid, that in *Rex* v. *Laindon*, which in other reſpects does not materially differ from this caſe, there was a premium; but there was no premium in *Rex* v. *Rainham* (*c*), but only a contract by the maſter to teach: and ſo in ſub-

(*a*) 5 *Mod.* 389. (*b*) 8 *T. R.* 383. (*c*) 1 *Eaſt*, 531.

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ſtance there is in this caſe; for the maſter was to have 1*s.* a week for teaching: and in *Rex* v. *Shinfield* (*a*) which was conſidered as not amounting to a caſe of apprenticeſhip, it ſeems to have weighed much with the Court that there was no contract by the maſter to teach.

Lord ELLENBOROUGH C. J. The ground of argument taken is, that the father was the contracting party, and could not bind the ſon. It certainly cannot be contended that the ſon would at all events be bound by the contract of the father; but in every caſe if a contract be made by a perſon ſtanding in a peculiar relation to another, on his behalf and for his benefit, and that other performs his part of the contract, there is no authority which ſhould reſtrain me from leaving to the jury whether he did not adopt the contract. It ſeems abſurd to ſay that if a party contract on my behalf that I ſhould do work, and I do it, that the rule of omnis ratihabitio does not apply. Every jury upon ſuch a queſtion would find a previous mandatum evidenced by the ſervice afterwards. Here the ſon is acting as ſervant; but if it were doubtful, the ſeſſions have drawn the concluſion, and have not ſubmitted to us any queſtion whether he was bound by the contract. The queſtion then is, whether this is a contract of hiring and ſervice, or of apprenticeſhip. It certainly cannot be called an apprenticeſhip, nor does it bear any of its forms; for although there is mention of an allowance to be made by the ſon on account of the maſter's teaching him the buſineſs, yet that is not peculiar to the contract of apprenticeſhip: it enters into the contemplation of almoſt every contract of hiring and ſervice how far the ſervant has learnt his art, or ſtands in

(*a*) 14 *East*, 544.

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need of farther inſtruction; and according to his proficiency a conſideration is made in the rate of wages. It is the meaſure to which each party reſorts in apportioning the compenſation; and if the circumſtance of the ſervant's having to learn his art is to make a difference, it would change the nature of moſt contracts of hiring and ſervice, even in the meaneſt ſituations, into that of an apprenticeſhip. As to *Rex* v. *Little Bolton*, without ſaying whether one quite approves the principle of that caſe, it is enough to ſay that the Court has been ſo much in the habit of acting upon that deciſion that it would now be dangerous to ſet it aſide. I do not ſay that if that caſe were erroneous and wholly deſtitute of legal foundation, it would not be right to ſet it aſide; but if it ſtands on plauſible grounds, it ought not to be canvaſſed too nicely. This caſe is ſtronger than *Rex* v. *Little Bolton*; there the maſter agreed to teach the pauper if he would work with him two years and a half or three years; ſo that the teaching was of the very eſſence of the contract. Here there is no expreſs contract by the maſter to teach, only an allowance by the ſervant out of the earnings for teaching, which perhaps may amount to an implied one. I will not ſay that an action might not be maintained upon this contract for not teaching, although upon a demurrer to a declaration framed upon it there might be difficulty. Admitting however that ſuch a contract may be inferred, it is by no means ſo clear as aſſumed in argument; and even if it were, it would not be ſo ſtrong as *Rex* v. *Little Bolton*, which was an expreſs contract. There Lord *Mansfield* obſerved upon the agreement not ſpeaking of the pauper as an apprentice, and here there is no mention of apprenticeſhip except as far as learning and teaching are ingredients in the contract of apprenticeſhip, which

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which they are alſo in almoſt every contract of hiring and ſervice regularly entered into. Therefore without ſaying that *Rex* v. *Little Bolton* is not law, we cannot hold that this is not a good hiring and ſervice.

GROSE J. The queſtion is, whether this is a hiring and ſervice. I have no doubt it is. Looking at the agreement we may ſee what was the intention of the parties. The intention was that the pauper's huſband ſhould ſerve his maſter for two years, and he accordingly did ſerve him, and thus adopted the contract.

LE BLANC J. The ſtatute law has enacted that a perſon may gain a ſettlement by apprenticeſhip or by hiring and ſervice. But it has been decided, that if an apprenticeſhip be intended and not regularly carried into effect, it cannot enure as a hiring and ſervice. A variety of queſtions therefore has ariſen upon this diſtinction, whether the contract amounted to an apprenticeſhip or a hiring and ſervice; and whenever it has appeared from the nature of the contract that the parties intended an apprenticeſhip, although they have failed in perfecting it, the Court has decided that it could not take effect as a hiring and ſervice. Here the ſeſſions have determined this to be good as a hiring and ſervice, and unleſs the Court ſee that their concluſion is wrong, we are bound to confirm the order. It is not ſtated in the caſe whether the pauper's huſband was an adult or infant; it is merely ſtated that he was an unmarried man having no child. In that ſituation his father agreed with the maſter that he ſhould be with him and work for two years, which is all that is ſtated with reſpect to the ſervice. The contract is made with another perſon on his behalf, and he ſerves

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under it. That would be evidence upon which I ſhould think a jury might infer that he adopted it. The ſeſſions have ſo inferred, and there is no objection. If that be ſo, then there is no material difference between this caſe and that of *Rex* v. *Little Bolton:* with the exception of names, place, and trade, the caſes are the ſame. It will not convert this contract into an apprenticeſhip, becauſe the party was deſirous of improving himſelf in the trade in which he was to work, or even ſtipulated for that purpoſe. Every workman who contracts for his labour, and is not perfect in his art, is deſirous of learning more, and it forms an ingredient in every ſuch contract. The Court therefore will not upon this ground hold it an apprenticeſhip, unleſs they ſee that ſomething more than a hiring and ſervice was intended. Now here it was agreed that the pauper's huſband ſhould work, and he did ſo; and he was to allow ſo much per week to his maſter for teaching him; which is the only circumſtance relied upon to ſhew it an apprenticeſhip. The queſtion is whether that is ſufficient to ſhew that the concluſion drawn by the ſeſſions was wrong; I think not, after the caſe of *Rex* v. *Little Bolton;* and even if the caſe were new, I am not prepared to ſay that this would give it ſo much the color of an apprenticeſhip as to prevent this ſettlement.

BAYLEY J. The ſeſſions might have truſted in this caſe to their own judgment, and ſhould not grant caſes unleſs they entertain ſerious doubts. They have drawn the concluſion, and unleſs we can ſay the premiſes do not warrant ſuch a concluſion we ought to confirm it, although perhaps we might have drawn a different one. I do not ſay however in this caſe that we ſhould. Allowing

lowing the utmoſt latitude to the arguments againſt the order, this was at leaſt a contract of an equivocal nature, and the ſeſſions have decided upon it. I think they have decided rightly.

Order of Seſſions confirmed.

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Wedneſday, May 12th.

ON appeal againſt an order for the removal of *Robert Gill*, his wife and children, from the townſhip of *Barnſley* to the townſhip of *Killinghall*, both in the Weſt Riding of the county of *York*, the Court of quarter ſeſſions diſcharged the order, ſubject to the opinion of this Court on the following caſe:

John Gill, the father of the pauper, was bound apprentice by indenture, dated the firſt day of *December* 1764, to *Thomas Harriſon*, in the townſhip of *Clint*, for ſeven years, and ſerved five years, until his maſter died, when in conſideration of three guineas paid by *William Bradfield* he was aſſigned by *Elizabeth Harriſon*, (widow of the ſaid *Thomas Harriſon*), by an unſtamped indorſement on the indenture, for the remainder of his term in the words following;

"*April* 14th, 1769. Be it remembered, that I *Eliza-*
"*zabeth Harriſon* of *Clint*, in the pariſh of *Ripley*, do ac-
"quit and aſſign over my apprentice *John Gill*, for all
"the remainder of his ſaid apprenticeſhip, unto *William*
"*Bradfield* the younger, of *Killinghall*." (Signed) *Eli-*

Where *J. G.* was bound apprentice by indenture in 1764 in the townſhip of *C.* and upon the death of his maſter in 1769 was aſſigned by the widow by indorſement on the indenture, whereby *ſhe acquitted and aſſigned over her apprentice J. G.* for all the remainder of his apprenticeſhip, and *J. G.* ſerved under ſuch aſſignment in the townſhip of *K.*, which townſhip for the laſt ſeven years had regularly relieved the family of *J. G.* whilſt reſiding in another pariſh: Held that this was evidence from which the ſeſſions ought to have preſumed, after ſuch a diſtance of time, that the widow was executrix and capable of aſſigning the apprentice, and that *J. G.* had acquired a ſettlement in *K.*, and conſequently that his ſon who had gained no ſettlement for himſelf was there ſettled; and the ſeſſions having drawn a contrary concluſion, this Court quaſhed the order of ſeſſions.

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Lord ELLENBOROUGH C. J. The only doubt is, whether where the ſeſſions have drawn a concluſion palpably erroneous upon two points, we ſhould ſend the caſe down again, or in eaſe of the parties draw the irreſiſtible concluſion ourſelves. The relief given by the pariſh of *Killinghall* to the family of *John Gill* for ſeven years is evidence of ſuch preponderating weight that I ſhould think any Judge would direct a jury to find upon ſuch evidence, (ſuppoſing the queſtion legally to come before them) that *Gill* was by ſome means or other a ſettled inhabitant of that pariſh. It does not indeed amount to an eſtoppel; but it is cogent evidence againſt the pariſh. The ſeſſions alſo ought to have drawn a different concluſion on the other point. The aſſignment (which it is admitted was not at the time required to be ſtamped) is in its form an aſſignment by the widow "as my apprentice;" and at this diſtance of time we will preſume, if neceſſary, that ſhe was lawful executrix; or even if ſhe were executrix of her own wrong, ſtill according to the caſe of *The King* v. *Eaſt Bridgeford*, if the pauper lived 40 days under that aſſignment we ſhould hold him ſettled in the pariſh; and one caſe is enough on ſuch a ſubject.

Per Curiam, Order of Seſſions quaſhed.

Holroyd and *Hamerton* were to have argued againſt the order.

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Wedneſday, May 12th.

BY an order of two juſtices, *Charles Trowbridge*, his wife and children were removed from the pariſh of *Tollard Royal*, in the county of *Wilts*, to the pariſh of *Ringwood*, in the county of *Hants*. The ſeſſions on appeal confirmed the order, ſubject to the opinion of this Court on the following caſe:

The pauper, being legally ſettled in the pariſh of *Tollard Royal*, and renting a cottage there of the annual value of thirty ſhillings, about *Eaſter* 1806 took a dairy of ſeven cows at ſeven pounds a cow for twenty weeks. The cows were to be fed on lands of upwards of ten pounds annual value, part lying in the pariſh of *Cranbourne*, and part in the pariſh of *Ringwood*. The pauper alſo had a ſmall houſe with the dairy ſituate in the pariſh of *Ringwood*, in which houſe the pauper's wife and family reſided during the whole twenty weeks, and the pauper ſlept ſometimes at *Tollard Royal*, and ſometimes at *Ringwood*. For about twelve weeks of the time he ſlept at *Ringwood*, and about eight weeks in his cottage at *Tollard Royal*, of which he kept poſſeſſion during the whole time. About nine o'clock of the night before the pauper gave up the dairy, having ſlept the preceding night at *Tollard Royal*, he came to *Ringwood* to pack up his furniture, and fetch back his wife and family; and he paſſed the night there, but did not ſleep nor go to bed,

Where a pauper rented ſeparate tenements of the joint-yearly value of 10*l.*, in the pariſhes of *T.* and *R.*, and had a houſe in each, in one of which in *R.*, his family reſided, and he ſometimes ſlept in one and ſometimes in the other, and on the laſt night of his holding the tenement in *R.*, having ſlept the preceding night in *T.*, he came to *R.* to pack up his furniture and fetch back his family, and paſſed the night there, but did not ſleep or go to bed, but was occupied in moving, and left the houſe with his family very early the next morning Held that his ſettlement was at *R.*

The renting an acre of land at 8*l.*, from *Eaſter* to *Octo-*

ber, for planting potatoes, where the land had been previouſly dug by the landlord for that purpoſe, and would not have been let for more than half that price if it had not been dug, was conſidered as a tenement of the yearly value of 8*l.*, although the caſe ſtated that in a common way an acre of ſuch land would not let for more than 2*l.*

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bed, but was occupied in packing up his goods. A waggon came about two o'clock in the morning to take the goods, and the pauper, his wife and family, with the waggon and goods, left their houſe at *Ringwood* between five and ſix o'clock in the morning, and returned to their cottage at *Tollard Royal*. The pauper afterwards quitted this cottage, and in the ſame year rented another cottage in the ſame pariſh of *Tollard Royal*, for which he paid two guineas a-year, and he had the uſe of a yard for his beaſts, pigs, and fowls to run in, for which he paid one pound a-year, and his landlord had the uſe of the yard at the ſame time. Whilſt he occupied this cottage and yard, he took nearly an acre of land in another pariſh *at the rent of eight pounds from* Eaſter *to* October *following, for planting potatoes. The ground had been dug by the landlord for that purpoſe, and it would not have been let for more than half that price if it had not been dug*. The pauper got a good profit by his crop; he alſo took twenty-eight lug of land of another perſon, which was ploughed for the ſame purpoſe, for which he paid fourteen ſhillings; and during the time he rented theſe pieces of land, he lived with his family in his houſe at *Tollard Royal*. Other land is let in the ſame pariſh at the ſame rate, when ploughed and prepared ready for potatoes in like manner. In a common way an acre of ſuch land would not let for more than two pounds, though when dug for a crop of potatoes it would let for eight pounds.

W. Williams and *Barwis*, in ſupport of the order of ſeſſions, began by adverting to an objection which they ſaid might perhaps be made to the pauper's ſettlement in *Ringwood*, viz. that he had not ſlept there the laſt

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night of his holding the dairy, but had merely gone thither for the purpose of removing his family, and was engaged in so doing during the whole night; so that the last night of his sleeping might be contended to be the preceding night, when he slept at *Tollard Royal*, and consequently his settlement would be there: [but Lord *Ellenborough* C. J. interposed by saying that he supposed that point would hardly be made; that the Court would not enter into minute enquiries whether the pauper slept, in the literal sense of that word; what would satisfy "pernoctavit," would be sufficient. The material question was, whether he had not gained a subsequent settlement in *Tollard Royal*.] As to that point they contended, that the pauper, whilst he resided in the second cottage at *Tollard Royal*, did not rent a tenement of the yearly value of ten pounds; inasmuch as the land which he rented for potatoes could not be estimated at the value which he paid for it, but at its value communibus annis, which appeared by the case to be only two pounds per annum. That was the fair yearly value of the land, which is the criterion fixed by the statute, and therefore the tenement must be estimated according to such value, and not according to the rent; and so it was determined in *Rex* v. *St. Matthew, Bethnall Green* (*a*), and *Rex* v. *Hellingly* (*b*). Here the additional rent beyond two pounds was only a payment made in consideration of an extraordinary portion of labour bestowed upon the land by the landlord, but had nothing of that permanent nature which is implied in the term yearly value; it was so much paid for digging the land. Suppose the pauper had dug it himself, and by that

(*a*) *Burr.*, S.C., 574. (*b*) 10 *East*, 41.

means

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means increaſed its value, or that he had agreed to give eight pounds for it provided the landlord would dig it, could it be contended in either of thoſe caſes that he had taken land of the yearly value of eight pounds? Then it can make no ſubſtantial difference that the labour was beſtowed beforehand, if it be true that the value of labour cannot form a component part of the yearly value of a tenement. If the pauper had taken this land by the year, he muſt have left it in as good a ſtate as when he entered upon it, and then the labour required for that purpoſe would have been ſo far a reduction of its value in his hands.

Caſberd and *W. Grant*, *contrà*, were ſtopped by the Court.

GROSE J. (*a*). The only queſtion is, whether the pauper came to ſettle on a tenement of the yearly value of ten pounds. Looking at the caſe, we find that he went to *Tollard Royal* with his family, and reſided there more than forty days. As to the value of the tenement which he occupied during that time, it is expreſsly ſtated to be above ten pounds; but it has been contended that the land which he rented from *Eaſter* to *October* for planting potatoes might be worth eight pounds for that time, and yet not of that value for a year. That propoſition I do not underſtand, and therefore cannot aſſent to it.

LE BLANC J. In this caſe the pauper rented a cottage in *Tollard Royal* at two guineas a-year, during which

(*a*) Lord *Ellenborough* C. J. left the court during the argument.

time

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time he alſo rented nearly an acre of land in another pariſh from *Eaſter* until *October* for planting potatoes, at the rent of eight pounds; which land had been previouſly dug by the landlord, and would not have been let for more than half that price, if it had not been ſo dug. The pauper alſo took another piece of land at fourteen ſhillings. All theſe premiſes taken together at the rent for which they were let, amount to above the value of ten pounds. But the queſtion is, whether we are to reduce that value by taking the land which was let for eight pounds at the rent for which it would have been worth to be let, if it had been in a different ſtate; or in other words, whether we are to deduct from the rent the value of the labour beſtowed by the landlord on the premiſes before he let them. I think the Court muſt look to what was the value of the tenement at the time the pauper came to ſettle upon it, without conſidering by what means it became of that value. I agree with the gentlemen who have argued on the other ſide, that the value of the tenement increaſed by the labour beſtowed upon it after the letting cannot be taken into the account; as if the pauper had taken it at the rent of five pounds, and had beſtowed labour upon it to the amount of five pounds more, that would not have made a renting of ten pounds. But where the labour has been previouſly beſtowed ſo as to make the land fairly worth the rent at the time it is taken, the Court cannot ſeparate the value of that labour from that of the land.

BAYLEY J. This is nothing more than a party taking land in a high ſtate of cultivation, which has rendered it of the value agreed to be given for it at the time of

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the taking. Nor do I think that it would have been worth leſs if it had been taken for a whole year. It is urged, indeed, by the counſel, that if the pauper had taken it for a year, he would have had to dig it himſelf, and then it would have been of leſs value to him than what was given for it for a ſhorter period; but it does not follow, that if he had taken it for a year, he would neceſſarily have had to dig it. I think therefore that this tenement, coupled with the other property, amounts to a tenement of more than ten pounds a-year.

Order of ſeſſions quaſhed (*a*).

(*a*) See *Rex* v. *Purley*, 16 *East*, 126.

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Wedneſday, May 12th.

THE Court of Quarter Seſſions for the county of *Buckingham* diſcharged an order of two juſtices for the removal of *Richard Mayes* from the pariſh of *Olney*, in the ſaid county, to the pariſh of *Earls Barton*, in the county of *Northampton*, ſubject to the opinion of this Court on the following caſe:

The reſpondents proved the pauper ſettled at *Earls Barton* by a certificate, dated the 25th of *July* 1788, and directed to the pariſh of *Olney*, acknowledging him to be then a legally ſettled inhabitant of the pariſh of *Earls Barton*. In order to ſhew a ſubſequent ſettlement, the appellants proved that whilſt the pauper was reſiding in the pariſh of *Olney* under the ſaid certificate, in or about the month of *September* 1800, and ſome time prior to the execution of the deed of feoffment hereinafter mentioned, he agreed with one *Michael Hinde*, that he, the pauper, would purchaſe a meſſuage belonging to *Hinde*, ſituate in *Olney* at the ſum of 52*l.*, if *Hinde* would allow 40*l.*, part of the ſaid 52*l.*, to remain upon mortgage, to which *Hinde* conſented; and in purſuance thereof, by a deed of feoffment, bearing date the 8th of *October* 1800, *Hinde*, in conſideration of the ſum of 52*l.*, therein mentioned to be paid by the pauper, conveyed to him (the pauper) in fee the ſaid meſſuage; and upon the deed of feoffment there was indorſed a receipt for the conſideration-money of 52*l.*, but in fact only 12*l.* were paid to *Hinde*, and the remaining

Where the pauper purchaſed a meſſuage for 52*l.*, under an agreement that the vendor ſhould allow 40*l.* of the purchaſe-money to remain upon mortgage, and ſuch mortgage was accordingly made, and 12*l.* only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took poſſeſſion, and reſided in it for ſome years, but was unable to pay the reſt of the purchaſe money, and afterwards agreed to ſell it to *B.* for 60*l.* who thereupon paid the 40*l.* to the original vendor, upon his delivering up to him the title-deeds, and the remaining 20*l.* to the pauper, on the execution of the conveyance to him, at which time the pauper quitted the meſſuage, not having reſided on it 40 days after the payment of the 40*l.* to the original vendor: Held that the pauper did not gain a ſettlement by reſidence on ſuch eſtate.

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remaining ſum of 40*l.* was ſecured to him by deed of mortgage, bearing date the 9th of *October* 1800, by which the pauper, purſuant to the agreement before mentioned, demiſed the ſaid meſſuage to *Hinde* for a term of 1000 years, in conſideration of the ſum of 40*l.* in the deed of mortgage mentioned to have been paid by *Hinde* to the pauper; and there was a proviſo for the deed's becoming void upon payment by the pauper, his heirs, executors, or adminiſtrators, to *Hinde*, his executors, adminiſtrators, or aſſigns, of the ſum of 40*l.*, with lawful intereſt, upon the 9th of *April* then next enſuing. The feoffment and deed of mortgage were both executed at the ſame time, and remained, together with the title-deeds, in the cuſtody of *Hinde*. The pauper immediately entered into poſſeſſion of the meſſuage, and continued to reſide therein, and paid the intereſt upon the ſaid ſum of 40*l.* to *Hinde*, until the execution of the deeds hereinafter mentioned; but, during ſuch time, never had the ability to pay off the principal. About a month before the 12th of *June* 1812, the pauper agreed with one *Thomas Bowden* to ſell to him the ſaid meſſuage, in conſideration of the ſum of 60*l.*, and ſoon afterwards *Bowden* paid to *Hinde* the ſum of 40*l.* in diſcharge of his mortgage, and in part of his (*Bowden's*) purchaſe-money, and received from *Hinde* the title-deeds, together with the deeds of feoffment and mortgage, which *Hinde* had never delivered up to the pauper. Afterwards by indorſement on the ſaid indenture of mortgage, bearing date the 12th of *June* 1812, *Hinde*, in conſideration of 40*l.* to him therein mentioned to be paid by the pauper, aſſigned the term of 1000 years to the pauper, and by deeds of leaſe and releaſe, dated reſpectively the 12th and 13th of *June* 1812, the pauper con-

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conveyed the meſſuage to *Bowden* in fee for the conſideration of 60*l.*; and 20*l.*, being the balance of the purchaſe-money, were then paid by *Bowden* to the pauper. The indorſement and indentures of leaſe and releaſe were all executed at the ſame time. The queſtion for the opinion of the Court is, whether the pauper gained a ſettlement in the pariſh of *Olney* by the purchaſe of the above eſtate and reſidence thereon.

Beſt, in ſupport of the order of ſeſſions, contended that the pauper gained a ſettlement by the purchaſe, it being a purchaſe of an eſtate for more than the ſum of 30*l.*, bonâ fide paid, although in fact 12*l.* only were paid at the time of the execution of the conveyance, and therefore it was not within the ſtat. 9 *G.* 1. *c.* 7. The principle which governed *Rex* v. *Tedford* (*a*) applies to this caſe. That was a purchaſe for 39*l.*, of which 9*l.* only were paid by the purchaſer, and the remainder was borrowed on mortgage; and it was holden, that the caſe was not within the ſtatute, Lord *Hardwicke* obſerving that it would be hard to enquire whether the purchaſer borrowed the money. And the ſame was ruled in *R.* v. *Chailey* (*b*). Both thoſe caſes are like the preſent in this, that the pauper mortgaged the premiſes as a ſecurity for part of the purchaſe money; and the firſt has this farther reſemblance, that the pauper did not himſelf pay the remainder of the purchaſe money; and although there it was paid immediately, and here not until ſome years after the purchaſe, ſtill when ultimately diſcharged on the 12th of *June* 1812, it became a bonâ fide

(*a*) *Burr. S. C.* 57. (*b*) 6 *T. R.* 755.

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payment of the whole ſum. [*Bayley* J. The pauper did not reſide forty days after that time.]

GROSE J. (*a*) The queſtion is, whether this was a purchaſe for the ſum of 30*l.* bonâ fide paid, ſo as to ſatisfy the ſtat. 9 *G.* 1., where the purchaſe was contracted for upon ſecurity to be given for part of the purchaſe money, and ſuch part never paid by the purchaſer. The caſe in ſubſtance ſtates that the premiſes were mortgaged for 40*l.* of the purchaſe money, and that that money was not paid. But I think that the conſideration muſt be bonâ fide paid at the time of the purchaſe, in order to ſatisfy the ſtatute. Then it is clear that this was not a purchaſe of an eſtate for 30*l.* paid at the time; the conſideration money having remained upon ſecurity.

LE BLANC J. The ſtat. 9 *G.* 1. enacts that no perſon ſhall gain a ſettlement by virtue of any purchaſe of any eſtate, whereof the conſideration doth not amount to 30*l.* bonâ fide paid. The queſtion ariſes on the purchaſe. The purchaſe money amounted to 52*l.*, of which 12*l.* only were paid at the time, the reſt was left on mortgage to the vendor. That circumſtance diſtinguiſhes it from the caſes cited, where the party purchaſing paid the whole money to the vendor, by borrowing a part aliunde; ſo that there he had credit to borrow of others. But in *Rex* v. *Mattingley* (*b*), which has not been cited, it was held where the purchaſer contracted for the purchaſe of a copyhold eſtate for 39*l.*, which was mortgaged for 32*l.*, and paid only 7*l.*, and

(*a*) Lord *Ellenborough* C. J. was abſent. (*b*) 2 *T. R.* 12.

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was admitted subject to the mortgage, that it was not a purchase for 30*l.* bona fide paid, so as to take it out of the statute. That is a direct authority on this part of the case. But it has been argued upon a supposed difference, inasmuch as the purchase money was ultimately paid in the subsequent transaction with *Bowden*. But how does that stand? All that was done by *Bowden*, when he became the purchaser of the estate, was, to pay off the incumbrance in order to get the title deeds into his hands, which had never passed from the original seller into the hands of the pauper. That was a payment therefore made by *Bowden* for his own benefit, and not on behalf of the pauper.

BAYLEY J. concurred.

Order of Sessions quashed.

King was to have opposed the order.

CASES

ARGUED AND DETERMINED 1813

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Fifty-Third Year of the Reign of GEORGE III.

FOMIN *againſt* OSWELL and Another.

Thurſday, May 13th.

Where the plaintiff in aſſumpſit failed to prove his ſpecial counts, but upon the common counts recovered leſs than 5*l.* upon the balance of an account which contained items both on the debet and credit ſide; Held that by 39 and 40 *G.* 3. *c.* 104. he was deprived of coſts, it appearing that the defendant reſided and traded in *London*.

THE declaration in this caſe contained ſpecial counts in aſſumpſit againſt the defendant, as broker, for omitting to inſert in the policy a leave to carry ſimulated papers, *per quod* the plaintiff was prevented from recovering againſt the underwriters (*a*); and there were alſo the common counts.

At the trial the plaintiff failed upon the ſpecial counts; but to intitle himſelf to a verdict, put in an account rendered by the defendant to the plaintiff, conſiſting of various items both on the debet and credit ſide, with a balance ſtruck of 4*l.* 19*s.* due to the plaintiff; and obtained a verdict for that ſum, which was entered on the count for money had and received.

(*a*) See *Oſwell* and another v. *Vigne*, 15 *Eaſt*, 70.

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Gaſelee on a former day obtained a rule niſi to enter a ſuggeſtion on the *London* act 39 and 40 *Geo.* 3. *c.* 104. (local) to deprive the plaintiff of his coſts, the damages being under 5*l.*, and the defendant reſiding and trading in *London*, and being liable to be ſummoned to the court of requeſts.

Marryat now ſhewed cauſe, and contended that this caſe was not within the act, inaſmuch as it was not a debt reduced by part payment before the action brought, but was in fact reduced by a ſet-off, though no notice of ſet-off was given; and referred to a caſe decided on the *Southwark* act (*b*) which he ſtated to be ſimilar to the preſent, in which it was held, that where the demand was founded on the balance of a larger account the caſe was not within the act.

Gaſelee referred to the two acts, which were different; the *Southwark* act expreſsly excepting actions brought for the balance of an account, whereas the *London* act contained no ſuch exception. He alſo ſtated that no evidence was given of the items of the account, but the only evidence was the account itſelf, in which the balance was ſtruck in the hand-writing of the defendant.

The Court thought this a caſe within the ſtatute, and made the Rule abſolute.

(*b*) *Porter* v. *Philpot*, 14 *Eaſt*, 344.

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TOLPUTT *againſt* ANN WELLS, Executrix of WELLS deceaſed. (*a*)

Friday, May 14.

A judgment confeſſed by an executrix to a creditor of the teſtator as well for his own debt as in truſt for the debts of many of the creditors, cannot be pleaded in bar to an action brought againſt her by another creditor of the teſtator.

Plea that *M.* recovered a judgment againſt defendant as executrix for 1990*l.* claimed to be *due to him* from the teſtator; rejoinder that the judgment was confeſſed to *M.* for that ſum *for his own debt and as truſtee for the debts of many other creditors:* Held that the rejoinder was a departure from the plea.

Quære, if a plea of judgment recovered muſt ſtate the cauſe of action.

THIS came on upon demurrer to the rejoinder; the declaration was upon a bill of exchange drawn by the plaintiff, and accepted by the defendant's teſtator; the defendant pleaded that one *J. Monday* in Michaelmas term in the 52d year of the king, impleaded the defendant as executrix of *Wells* in a plea of debt for the ſum of 1990*l.*, claimed by *Monday* to be due and owing to him from the ſaid *Wells* in his lifetime and at the time of his deceaſe, and thereupon recovered judgment for the ſaid ſum of 1990*l.* to be levied in part, *viz.* as to 1250*l.* upon the goods and chattels of the teſtator, then in her hands, and as to the reſidue *de bonis quando acciderint:* which judgment ſtill remains in force and unſatisfied: the plea then alleged that at the commencement of this action 1990*l.* were and ſtill are due upon the judgment, and that ſhe hath fully adminiſtered, except goods and chattels of the value of 1250*l.* which are not ſufficient to ſatisfy the debt due on the judgment, and which are liable to ſatisfy the ſame. Replication; that before and at the time of obtaining the judgment in the plea mentioned, there was really and juſtly due to *Monday* from the defendant as executrix, a much leſs ſum of money than the ſum of 1990*l.*, to wit, 150*l.*, and no more, and that the defendant at the time of obtaining the judgment, had and now hath goods and chattels of the teſtator in her hands more than ſufficient to pay the ſum really due to *Monday*; but that the judgment ſo recovered againſt

(*a*) This caſe was partly argued at *Serjeants Inn.*

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the defendant for 1990*l.* was recovered for that ſum by fraud and covin between *Monday* and the defendant, with intent to defraud the plaintiff of his damages in the declaration mentioned.

Rejoinder; that the teſtator at the time of his death was indebted to divers perſons, to wit, to *J. Monday* in the ſum of 9*l.*, (it then proceeded to enumerate the names of many other creditors with the ſums alleged to be due to each, making a total debt amounting to 1998*l.*,) which ſaid ſeveral ſums of money at the time of making the agreement hereafter mentioned, and the recovery of the judgment in the plea mentioned, were wholly unpaid; and that the goods and chattels of the teſtator in the hands of the defendant being wholly inſufficient to pay the whole of the ſeveral ſums due to the ſaid creditors, it was agreed between the defendant and the ſaid creditors, that ſhe ſhould execute a warrant of attorney to ſecure to the ſaid *Monday* for himſelf, *and as truſtee for the ſaid creditors*, the payment of their debts; that in purſuance of ſuch agreement, and before the commencement of this ſuit, the defendant did execute a warrant of attorney as executrix, to confeſs a judgment to *Monday* (to be entered up in the manner as is ſet forth in the defendant's plea) for 1990*l.*, money borrowed by the teſtator in his life time of *Monday*, with a defeazance that it ſhould remain in force until the ſeveral debts due to the ſaid creditors ſhould have been fully ſatisfied. The rejoinder then proceeded to ſtate that the ſaid creditors ſubſcribed their names to the warrant of attorney, and that their debts exceeded 1990*l.*, for which judgment was obtained, and that the defendant hath fully adminiſtered except goods and chattels of the value of 1250*l.*,

which are not sufficient to satisfy the money due to the creditors who subscribed the said warrant of attorney, and which are liable to satisfy the same. It then averred that the warrant was given and judgment recovered in pursuance of the agreement for the benefit of the said creditors, and was not recovered by fraud and covin as alleged in the replication.

Demurrer to the rejoinder, assigning for causes, that the rejoinder does not support the plea, but is a departure therefrom, inasmuch as in the plea the judgment alleged to have been recovered by *Monday*, is stated to have been recovered for 1990*l.*, claimed by *Monday* to be due to him from the testator in his lifetime and at his decease; whereas by the rejoinder it is acknowledged that the said sum of money for which judgment was recovered by *Monday*, was not wholly due to him, but that a small part thereof only was due to him, and the residue to divers other persons, and that the judgment was obtained by him as a trustee only for himself and such other persons; and that the rejoinder is in other respects defective, insufficient, and informal.

Gaselee, in support of the demurrer, made two points; first, that the judgment confessed by the defendant as executrix, to one simple contract creditor as a trustee for many other simple contract creditors, could not be pleaded in bar to this action. The only authority which can be said to favor such a plea is what fell from *Lawrence* J. in the case of *Meux q. t.* v. *Howell* (*a*); for as to the case itself it cannot be deemed an authority upon this

(*a*) 4 *East*, 9, 10.

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point; it being a penal action brought againſt the defendants on the 13 *Eliz. c.* 5. for being parties to a covinous judgment; which judgment was confeſſed by a debtor for the benefit of *all* the creditors, and therefore affords a material diſtinction between that caſe and the preſent, where there is an exception at leaſt of the preſent plaintiff, if not of more creditors. It is clear that this judgment could not have been confeſſed by previous agreement with the creditors named; inaſmuch as the ſum for which it was confeſſed does not correſpond with the aggregate amount of their debts. So that this muſt be taken as nothing more than a contrivance between the executrix and *Monday* to defeat the plaintiff of his action. It is ſufficiently hard upon a creditor who has uſed due diligence in commencing his action, to find himſelf barred by a judgment confeſſed to another creditor; this, however, the law permits an executor to do, although it has been conſidered as ſomewhat of an anomaly. But if this judgment can be pleaded, it will enlarge the power of an executor to give a preference far beyond its former limits; for it will enable him to the prejudice of any one creditor, to confeſs a judgment to another creditor not merely for his benefit, but for the benefit of any number of creditors whom the executor may chooſe to ſelect; although not one of thoſe creditors ſhall have uſed any legal diligence to obtain that judgment; and it will alſo enable the executor, acting in concert with one creditor to commit a fraud on all the other creditors. Secondly, the rejoinder is a clear departure from the plea for the cauſe aſſigned in the demurrer; the plea alleges the judgment to have been recovered for money claimed to be due to *Monday* as for his own debt; whereas in the rejoinder it is ſtated

to

to be for money due not only to *Monday* but alſo to ſeveral other creditors. And this allegation in the plea is material and cannot be rejected, ſo as to make the plea conſiſtent with the rejoinder: but even if it could be upon general demurrer, yet, where objection is taken upon ſpecial demurrer, it cannot be conſidered as ſurpluſage (*a*).

Comyn, contra, in anſwer to the firſt objection, ſaid that no caſe had been cited to ſhew that it was either illegal or improper for an executor to confeſs a judgment like the preſent. It is ſaid, indeed, that to permit ſuch confeſſion would be impoſing a hardſhip on a plaintiff, who has uſed due diligence for the recovery of his debt; but if the teſtator in his lifetime might himſelf have confeſſed ſuch a judgment, and have ſubjected his property to an execution thereupon, and that, even after action brought againſt him by another creditor; ſurely the executor may give the ſame preference, which his teſtator might have given. It is true, that after action brought by one creditor the executor cannot pay the other creditors as the teſtator might have done, but ſtill he may do that indirectly, by means of confeſſing a judgment which he cannot do directly. It appears from the third reſolution in *Veale* v. *Gatesdon* (*b*), that where a judgment is recovered againſt an executor for a juſt cauſe it cannot be ſaid to be covinous, although it was done for the purpoſe of defeating another creditor. So in *Williams* v. *Fowler* (*c*), which underwent three arguments, *Eyre* J. ſaid, "there is no in-

(*a*) 1 *Wils.* 98. *Barlow* v. *Evans*. *Str.* 694. *Courtenay* v. *Satchwell*.
(*b*) 8r *W. Jones*, 92. (*c*) *Str.* 410.

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convenience in letting executors confeſs judgments; for if there be a precedent debt, all is fair; if none, the party will have them on the fraud." Theſe authorities therefore clearly eſtabliſh the right of an executor to confeſs a judgment in order to give a preference. In this caſe it may be aſked, what more has the executrix done? Here the executrix pleads a judgment recovered againſt her by *M.* before the commencement of the plaintiff's action for a ſum certain; in reply to which, the plaintiff denies that the teſtator was indebted to *M.* in ſo large a ſum as the ſum recovered. It therefore became neceſſary for the executrix to explain how the judgment came to be confeſſed for ſo large a ſum, in order to ſhew that it was *bonâ fide:* and ſhe has done ſo; and it is admitted on the pleadings, that the judgment was confeſſed for fair and *bonâ fide* debts: but objection is taken, that this is not a judgment confeſſed to one creditor for himſelf, but to one on behalf of himſelf and ſeveral creditors. But if an executor has by law a right to confeſs a judgment to a particular creditor, why may he not, in order to avoid a multiplicity of actions, confeſs a judgment to one for the benefit of many? If there be a precedent debt, according to what was ſaid by *Eyre* J. (*a*) all is fair. So in *Meux* v. *Howell* (*b*), *Lawrence* J. was of opinion, that a plea by an executor, ſtating that the teſtator was indebted to *A.* *B.* and *C.* in ſo much reſpectively, and that the judgment was acknowledged to *A.* in truſt to ſecure all their debts, would be good. Lord *Kenyon* alſo ſeems to have expreſſed himſelf to the ſame effect in ſeveral paſſages cited in argument in that caſe, which ſhew it was his opinion that it is neither illegal nor immoral to prefer one ſet of creditors to

(*a*) Str. 410. (*b*) 4 *Eaſt*, 10.

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another. The only caſe where the law does not allow ſuch a preference is, where a voluntary preference is given by a trader in contemplation of bankruptcy. It is true the preciſe point now under diſcuſſion has not before ariſen; but it is ſubmitted upon the principles already eſtabliſhed in the caſes cited, that ſuch a judgment may be confeſſed by an executor, eſpecially as it will avoid a multiplicity of actions. If this defendant inſtead of confeſſing one entire judgment for the benefit of each, had confeſſed ſeparate judgments to each creditor, the plaintiff could not have replied *per fraudem;* and there ſeems to be no greater injury likely to ariſe to the plaintiff from this form of confeſſion than from the other. [Lord *Ellenborough* C. J. inquired whether in pleading a judgment recovered it was not uſual to ſhew in pleading how the debt accrued.] It was conſidered not to be neceſſary in *Williams* v. *Fowler* (*a*). It is uſual, indeed, in pleading judgments to ſtate the cauſe of action; but many precedents may be found where the allegation is ſimply for a certain cauſe of action. It is unneceſſary to ſtate either the preciſe ſum or the cauſe of action. The party pleading may rely upon the judgment without ſhewing the conſideration of it, the want of which ſhould come of the other ſide, who may impeach it for the fraud if there be any. On the ſecond point, he inſiſted that the rejoinder was not to be taken as a departure, but merely as explaining and fortifying the plea. The plea does not contain a poſitive allegation that the teſtator was indebted to *M.* in ſo much, but only that *M.* impleaded the defendant as executrix for ſo much. Then the rejoinder ſhews how he came

(*a*) *Str.* 407.

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to ſue for that ſum which is in aid and explanation of the plea. But admitting it to be a departure, ſtill it is a departure in a thing not material, which according to the authorities (*a*) will not vitiate.

Gaſelee, in reply. Upon the principal queſtion, if the caſe be new, the Court will pauſe before they ſanction ſuch an extenſion of the eſtabliſhed practice as is now contended for; more eſpecially as the eſtabliſhed practice itſelf is an anomaly; and is the only inſtance where a party can avail himſelf of an act done ſubſequently to defeat a prior action. To extend the practice would be productive of the inconvenience, of which this caſe is an inſtance; for the judgment confeſſed not only covers the whole of the preſent aſſets, but alſo any future aſſets which may come to the hands of the executrix. As to the dictum of *Lawrence* J., in *Meux* v. *Howell*, it cannot be regarded as a judicial deciſion, concluſive of the queſtion. As to the ſecond point he maintained his former argument; but ſuppoſing that failed, he further inſiſted, in objection to the plea, that it did not ſtate the cauſe on which the debt accrued, or that the debt was due from the teſtator at the time of his death; both of which ſhould be ſtated in a plea of judgment recovered. In *Williams* v. *Fowler*, although this objection was adverted to, the Court without much conſidering it, ſeem to have decided the caſe upon another ground, viz. that the judgments were not fraudulent.

LORD ELLENBOROUGH C.J. This is a fanciful attempt to introduce a novelty in the eſtabliſhed law relating to

(*a*) *Co. Lit.* 304. a. *Com. Dig. Plead. F.* 11.

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executors. The law is, that an executor upon action brought againſt him by a creditor of his teſtator has his hands tied, ſo that he cannot afterwards make any payment to the prejudice of that creditor. But he has no direct power of accelerating a ſuit inſtituted by one creditor, and ſtill leſs have the body of creditors: that being the caſe, if an executor had not power to confeſs a judgment, his operations and duties might be ſuſpended and paralized by one creditor protracting his ſuit; and in the ſame manner might the other creditors be delayed of their rights. The only means then which the executor has of accelerating ſuch ſuit is by confeſſing a judgment. But to whom muſt this be done? To a creditor alone, but not to a ſtranger: there is not any authority to ſhew that an executor may confeſs a judgment to a ſtranger. Now in this caſe *Monday* is a mere ſtranger *quoad* all but 9*l.* If then this judgment be good, it would go the length of enabling an executor to confeſs a judgment to a creditor, who claimed a debt of 1*s.* only, to the extent of 10,000*l.*, provided the teſtator's debts amounted to ſo much. Would this be beneficial either to the creditors or the executor? Firſt as to the executor; ſuppoſing him ſued afterwards by another creditor, he muſt plead this agreement, viz. that it was agreed between him and the other creditors that he ſhould execute a warrant of attorney to confeſs a judgment to one of them for the benefit of thoſe creditors, and that in purſuance of ſuch agreement he did ſo execute. No doubt the agreement would be evidence againſt thoſe who ſubſcribed it: but is it ſo clear that it would be evidence againſt the creditor who was not a party to it? If not, as probably the executor could have no other evidence, he would ſtand in an unprotected

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situation with respect to the creditor suing, and nevertheless be bound by a judgment recovered in trust, against him. Then to consider what benefit would arise to the creditors from having such a judgment; they would only acquire the benefit of a suit in equity; for if the trustee would not pay them, they must resort to a court of equity to compel him, unless they could maintain an action of assumpsit: at all events, it would only be to them the first step gained either for an action at law or suit in equity. This, therefore, is a novelty in the law of executors, which would be neither beneficial to them nor to the creditors. As to the dictum of *Lawrence* J. in *Meux* v. *Howell*, I think that it is at the discretion of the executor to confess a judgment to a creditor to the full extent of the debt due to him; but it must be restrained by the amount of his debt, because the executor is not to be charged with more than is really due to the creditor. So much as to the merits. As to the departure the case is equally clear. The plea is, that *M.* impleaded the defendant in a plea of debt for 1990*l.* claimed by *M.* to be due and owing to him. But no such sum is really claimed by *M.*, but on the contrary, he claims only 9*l.*; and so the defendant adds in his rejoinder: this therefore is a clear departure as admitted in the rejoinder, for it appears by that, the debt is due to a multiple of persons and not to *M.* alone as alledged in the plea.

GROSE J. I cannot think this agreement can be supported as pleaded. It is in reality a fanciful attempt at novelty, and nothing more clearly shews it than this, that there is no instance of such a form of pleading. The agreement itself would go to defeat the whole law of

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of assets, and to give a preference to single contract creditors over specialty creditors, who by using due diligence are entitled to a priority. Upon the other point, my Lord has entered very fully, and I am not prepared to add any thing.

LE BLANC J. I perfectly agree with my Brothers on both points. I think this is a novel attempt to introduce a mode of pleading different from that which has hitherto prevailed. Suppose the whole of the facts disclosed in the rejoinder had been included in the plea, — the plea would then have stood thus, viz. that the testator at his death was indebted to a number of persons in different sums of money, and that the defendant as executrix gave a warrant of attorney to confess a judgment to one of those creditors, to enure to the benefit of all, and that she had assets only to such an amount, which were not sufficient to pay the debts of all. Could it be contended that such a plea would be sustainable? It is clear that where a testator dies indebted both in specialty and simple contract debts, and the simple contract creditor has brought an action upon his debt, that the executor has no right to pay a creditor in equal degree; but as he cannot compel that creditor to proceed, he may accelerate him by confessing a judgment to another creditor, and may afterwards plead that judgment to the action. So far the law allows: but on the other hand, a creditor has a right to the fruits of his diligence, and may avail himself of the means of compelling an executor to plead before he can confess a judgment; and if the executor should pray for time to plead, he would obtain it only on condition of his not confessing a judgment. The present mode of proceeding would defeat all these rules; for

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for the executor would be enabled to plead one judgment once for all, which would make it nugatory ever to impose terms upon him on his applying for further time. The effect also of this mode of pleading would be to enable the executor to set up in bar of this action the claims of a number of creditors, whose debts still remain simple contract, not altered by any thing that has been done. *Monday*, indeed, has a higher debt, but not the other creditors, although they may have a claim in equity against him. Their debts therefore cannot be thus set up. There is another ground also against this mode of pleading, viz. that although it is not illegal or immoral for an executor to confess a judgment, yet certainly the law has expressed a great jealousy lest it should be made an improper use of, and on that ground it proceeds when it imposes terms on an executor who prays for time to plead. That brings it to the second question, whether this be a departure? The plea states that *M.* impleaded the defendant for a sum of 1990*l.* claimed by *M.* to be *due to him*, and that such proceedings were had, that he recovered against the defendant the said sum, &c.: so that the claim is clearly made as for a debt of 1990*l.* due to himself. The rejoinder states, not that he claimed the sum of 1990*l.* as due to himself, but a smaller sum only as due to himself, and the rest, which is the larger sum, for the other creditors, and that judgment was confessed for the benefit of himself and the other creditors. Admitting that perhaps it was not necessary for the defendant to have alleged in her plea, that *M.* recovered judgment upon a debt claimed to be due to himself, yet if she does make such allegation I cannot say that it is immaterial or impertinent. The rejoinder therefore is a clear departure from the plea. The only authority which the

industry of the counsel has been able to furnish, is a dictum of *Lawrence* J. in *Meux* v. *Howell*, which seems to me to have been thrown out rather as a question to the counsel in the course of the argument, to ascertain how far such a judgment would be fraudulent, than as an opinion of that learned judge. I do not therefore feel pressed with the weight of it as if it had been his deliberate opinion.

BAYLEY J. I am of the same opinion. This is a contrivance to pay the creditors through the intervention of *Monday*, a sum of money which the executrix would not have been entitled to pay without his intervention. Where an action is brought by a creditor of the testator against his executor, the executor is restrained from paying any other creditor in equal degree except upon compulsion. That inconvenience may however be obviated by any of the creditors filing a bill in a court of equity against the executor for an account, in which case it seems that all the creditors may be compelled to take an equal distribution of the assets (*a*); therefore, although at first sight it may seem hard that one creditor should tie up the hands of the executor by bringing an action at law, yet this may be remedied in equity. But this is an attempt not to do what equity would compel, viz. to let in this creditor equally with the rest, but to pay the rest to his exclusion: which cannot be done. An executor may, indeed, pending an action against him by one creditor, confess a judgment to another in equal degree, provided he do it before he is compelled to plead to the action; because up to that extent the law allows him to

(*a*) 1 *Camp. N. P. C.* 148. *Brady* v. *Steil.*

give

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give a preference. And in many inſtances an executor may give a very wiſe and honeſt preference; for as to ſome he may be ſatisfied of the debt, but as to others may require further time to conſider. But this is not a caſe where the executrix has given a fair legal preference by confeſſion of a judgment to the other creditors; for *M.*, to whom the judgment for 1990*l.* was confeſſed, was a creditor only for 9*l.*, and the other creditors were only ſimple contract creditors, and their debts did not become of a higher nature by the judgment confeſſed to *M.* on their behalf. As the executrix therefore could not have paid them herſelf, ſo neither can ſhe make *M.* the inſtrument of doing that for her which ſhe herſelf was incompetent to do. I agree with the Court on the other point reſpecting the departure, but the firſt is the main and ſubſtantial queſtion.

Judgment for the Plaintiff. (*a*)

The rule that a voluntary appearance ſhall be of none effect unleſs ſome proceſs be ſued out within 14 days after ſuch appearance, cannot be taken advantage of by any but the defendant unleſs ſome particular fraud is alleged.

(*a*) In the courſe of the argument Lord *Ellenborough* referred to the caſe of *Mackreth* v. *Jackſon*, executrix, *B. R. Hil.* 25 *Geo.* 3. We have been favoured with the following note of that caſe from a MS.:

The defendant pending this action confeſſed judgments to different creditors of the teſtator, which ſhe pleaded to the action. No proceſs had been ſued out in the actions upon which the judgments were confeſſed.

Law, for the plaintiff, moved to ſet aſide theſe judgments, relying upon a rule of *Trin.* 4 *W.* & *M.* That if defendant ſhall voluntarily appear at the ſuit of any plaintiff in any action here in court, ſuch appearance ſhall be of none effect, unleſs ſome proceſs be ſued out within 14 days next after ſuch appearance. He contended that ſuch confeſſion, &c. to particular creditors was an undue preference.

Per Curiam. The plaintiff who is a ſtranger to theſe actions, is not entitled to take advantage of that rule without ſome particular fraud which is not alleged.

Rule refuſed.

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GRAHAM and Another *againſt* GRILL.

Monday, May 17.

THE plaintiffs ſued out an original againſt the defendant, upon an affidavit of debt, on the 31ſt of *October* 1811; in which month the defendant left the kingdom, and the plaintiffs proceeded to outlawry. In *December* 1812, a commiſſion of bankruptcy iſſued againſt the defendant; and in *Hilary* vacation laſt he returned to England and ſurrendered to his commiſſion; and on a former day, in this term, obtained a rule for reverſing the outlawry upon putting in bail in the alternative, *i. e.* to ſatisfy the condemnation money, or to render the principal.

The court *upon motion* reverſed the outlawry of the defendant in a civil ſuit upon his putting in bail in the alternative, to ſatisfy the condemnation money, or render the principal, and paying all coſts, including coſts, if any, in the Court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money abſolutely.

Taddy upon ſhewing cauſe, contended that it was reaſonable in this caſe, that the bail ſhould be required to enter into a recognizance to ſatisfy the condemnation money abſolutely and not in the alternative, on account of the delay which had been cauſed by the defendant, and becauſe this was an application to reverſe the outlawry upon *motion*. He ſaid there was not any caſe in which the Court upon motion had granted the application in the form now prayed, and he cited *Matthews* v. *Gibſon* (*a*). The diſtinction is between reverſal upon motion and writ of error. All the caſes on this ſubject, with the exception of one in *Salkeld* (*b*), are collected in *Havelock* v. *Geddes* (*c*), where indeed the court allowed the defendant to put in bail in the alternative; but that was upon error brought, and Lord *Ellenborough* C. J. in delivering the judgment took the diſtinction, ſaying, "If a party aſk of the Court to interfere by motion,

(*a*) 8 *Eaſt*, 527. (*b*) *Salk.* 496. *Symmons* v. *Bingoe*. (*c*) 12 *Eaſt*, 622.

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where he has no right to their interference, but only upon error brought, they may in that case impose upon him what terms they think just."

Marryat, contrà, insisted that there had not been any real delay; for if the plaintiffs had recovered judgment in the usual course, and taken the defendant's goods in execution, the assignees would have been entitled to recover them back, because the act of bankruptcy must have been committed previously to the defendant's leaving the kingdom, and therefore before the plaintiffs' action. It is a mistake to suppose that the Court has not entertained applications of this kind upon motion; the old mode certainly was by bringing writ of error and appearing in person, but that is dispensed with by the stat. 4 and 5 *W.* and *M. c.* 18., which was passed for the more easy reversal of outlawries.

Lord ELLENBOROUGH C. J. It appears to us, that the Court, upon motion, may exercise their discretion, as to what terms they will impose upon the party. Whether the defendant had remained in *England* or gone abroad, he would have been equally a bankrupt. It is reasonable, however, that the plaintiffs should be put in statu quo; we think, therefore, that upon payment of all costs, including any which may have been incurred in the Court of Exchequer, this rule should be made

Absolute.

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The KING *againſt* The Juſtices of DEVON.

Monday, May 17.

A Rule was obtained laſt term for a mandamus to the juſtices of *Devon*, to receive an appeal made againſt a diſtreſs for non-payment of a ſum of money aſſeſſed under the highway act. The material facts in ſupport of the rule were theſe; that the party aſſeſſed having refuſed to pay ſuch aſſeſſment, a warrant of diſtreſs was ſigned and granted by two juſtices on the 4th of *December*, which was executed upon his goods on the 12th, the party thereupon gave notice of appeal within ſix days after the 12th of *December*. At the ſeſſions it was objected that the notice of appeal ought to have been within ſix days after the date of the warrant and not the execution of it, and the ſeſſions being of that opinion diſmiſſed the appeal.

The notice of appeal required by 13 *G.* 3. *c.* 78. *ſ.* 80. againſt a diſtreſs for non-payment of a highway rate, may be within ſix days after the levy, and need not be within ſix days after the granting the warrant of diſtreſs. The notice of appeal need not diſcloſe the grounds upon which the appellant objects to the regularity of the diſtreſs.

Harris now contended that the juſtices at ſeſſions had done right, inaſmuch as the notice to be given by the 13 *G.* 3. *c.* 78. *ſ.* 80. within ſix days after the cauſe of complaint aroſe, muſt be intended of the ſix days ſubſequent to the date of the warrant which was the real cauſe of complaint, and not of the levy which was only conſequent upon it: the warrant was the judicial act againſt which the appeal lies. He likewiſe took an objection to the form of the notice, that it merely ſtated that a diſtreſs was made without diſcloſing the grounds upon which it was to be contended that the diſtreſs was irregular; and he compared it to the caſe of notice of appeal againſt poor-rates, where it is neceſſary to ſtate the grounds of appeal.

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The KING *against* the Juſtices of DEVON.

Lord ELLENBOROUGH C. J. Suppoſe notice of action againſt a magiſtrate for taking goods, would it not be ſufficient to ſtate that he had taken the goods under a warrant, and that the party intended to bring an action thereupon? The onus lies on the other ſide to ſhew the legality of the diſtreſs; the party aggrieved need not enter into a ſpecial argument in his notice: if he point out the matter of the appeal, it will be ſufficient without aſſigning ſpecial cauſes on which, perhaps, he might be turned round. Then as to the time, the party appealing was within ſix days after he was actually damnified. It is not neceſſary he ſhould appeal on the warrant; for non liquet that it will be proceeded upon.

Per Curiam, Rule abſolute.

Gifford was in ſupport of the rule.

Tueſday, May 18.

WIGHTMAN *againſt* TOWNROE, DICKONS, THOMAS and JAMES WATSON and ARAM.

Where the executors of a deceaſed partner continued his ſhare of the partnerſhip-property in trade for the benefit of his infant daughter: Held that they were liable upon a bill drawn for the accommodation of the partnerſhip, and paid in diſcharge of a partnerſhip debt; although their names were not added to the firm, but the trade was carried on by the other partners under the ſame firm as before, and the executors when they divided the profits and loſs of the trade, carried the ſame to the account of the infant, and took no part of the profits themſelves.

ASSUMPSIT againſt the Defendants, for not providing money for the payment of a bill of exchange, drawn by the plaintiff, at the requeſt and for the accommodation of the defendants, with the uſual money-counts. At the trial before *Bayley* J. at the *Lent* aſſizes 1812, for the county of *Nottingham*, the plaintiff recovered a verdict for 135l., ſubject to the opinion of the Court upon the following caſe:

In 1804 the defendants *Townroe* and *Dickons* entered into partnerſhip with *W. Watſon* in the trade of maltſters. In the following year *W. Watſon* died, leaving an infant daugh-

ter;

ter; and by his will appointed the three other defendants his executors, who after his death continued his ſhare of the property in the trade *for the benefit of his infant daughter*. The trade was thenceforth carried on by the defendants *Townroe* and *Dickons* with the other defendants, the executors, for ſeveral years, but under the ſame firm of *Townroe* and Co. as before *W. Watſon's* death; bills were drawn and accepted, and large quantities of barley bought in the courſe of the trade, which were manufactured into malt for ſale, and every other act was done which was neceſſary to carry on the trade of maltſters. In making up the accounts, the executors divided the profit and loſs of the buſineſs with the other partners *Townroe* and *Dickons*, carrying on the buſineſs ſolely for the benefit of the daughter of *W. Watſon*, charging her in their account as executors with the loſs, giving her credit for the profits of the trade, and *taking no part of the profits to their own uſe*. The buſineſs was managed by *Townroe*, and it did not appear that the executors ever interfered except in ſettling the accounts. The bill of exchange ſtated in the declaration was drawn by the plaintiff in favour of *Townroe* and Co., at the requeſt of *Townroe*, and for the uſe of the firm of *Townroe* and Co., upon an undertaking which they did not fulfil, to provide money for it when it ſhould become due. It was afterwards indorſed by *Townroe* in the name of the firm of *Townroe* and Co., and was paid away in diſcharge of a debt of the firm. The queſtion for the opinion of the Court is whether *T.* and *J. Watſon*, and *Aram*, by taking a ſhare of the profits as executors or truſtees for the infant, did or did not become perſonally liable as partners in the trade. If the Court ſhall be of opinion

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in the affirmative, the verdict to ſtand; otherwiſe a nonſuit to be entered.

Copley for the plaintiff contended, that the executors were perſonally liable as partners. He obſerved upon the facts that they were executors and truſtees appointed by the will of the teſtator, and in them therefore the legal title to the perſonalty veſted; and they continued it in the trade, and received their proportion of the profits, and were accountable for the loſſes; conſequently they anſwered to the character of partners in every reſpect; and the ſubſequent diſpoſition of the profits in favour of the infant could not vary their liability. A court of law cannot regard truſts; and therefore whether they took the profits for the benefit of themſelves or that of the infant, their liability at law was the ſame. This fully appears from the caſe *Ex parte Garland* (*a*), which although in its deciſion not preciſely the ſame, in its language is deciſive. There the teſtator, who was a miller, directed that his trade ſhould be carried on by his widow, whom he appointed one of his executors, and that a certain ſum ſhould be paid her out of his perſonal eſtate for that purpoſe: And the widow (executrix) having become bankrupt, the queſtion was whether the general aſſets beyond the fund embarked in the trade were liable; and it was holden, that they were not; but upon the liability of an executor who enters into trade, the language of the Lord *Chancellor* is extremely ſtrong. He ſays, "the caſe of an executor "is very hard. He becomes liable, as perſonally re- "ſponſible, to the extent of all his own property, and alſo

(*a*) 10 *Veſ.* 110.

"in

"in his perſon, and may be proceeded againſt as a bank-"rupt, although he be but a truſtee." And although it may be ſaid in that caſe the executrix carried on trade in her own name, which is not the caſe of theſe executors; ſtill an executor may become liable as a partner in trade by embarking his property, and ſharing in the profits and loſſes of ſuch trade, as well as by making himſelf oſtenſibly a partner. And it will be found that the language of the Lord *Chancellor* was general, and not confined to the reſponſibility alone of an executor, which ariſes ſtom his holding himſelf out to the world as a partner. So in *Barker* v. *Parker* (*a*), Lord *Mansfield* ſaid, "executors eo nomine do not uſually carry on trade: if they do ſo, they run great riſk; and without the protection of the Court of Chancery they would act very unwiſely in carrying it on." Now this riſk can only mean their being perſonally liable. Conſidered in a court of law, the benefit of the trade muſt be taken to reſult to the executor; although it may be reaped ultimately by the ceſtui que truſt, through the medium of a court of equity.

Reader, contrà. There are only two ways by which a perſon can be made liable as a partner; firſt, by beneficially participating in the profits, in which caſe, it muſt be admitted, he will be liable, although he does not appear to the world as a partner. Secondly, by holding himſelf out to the world as a partner, and then he will be liable, although he does not ſhare in the profits. The doctrine laid down in *Ex parte Garland*, and *Barker* v. *Parker*, carries the liability of executors no farther:

(*a*) 1 *T. R.* 295.

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in the former the buſineſs was conducted by the executrix in her own name, and ſhe was known to the world as the trader. No doubt, if an executor will enter into ſuch a ſituation, he will be liable, although trading with the funds of the teſtator, and although he reſerve no profits to his own uſe. On the other hand, a dormant partner, who ſhares the profits, is liable. But here the executors never traded in their own names, for the trade was continued under the ſame firm as before; and never became beneficially intereſted in a ſhare of the profits; nor did they interfere in any way, except by accounting for what was due to the infant. If this then can be conſidered as amounting to a partnerſhip, every executor, who permits the fund of his teſtator to remain in the trade, will become a partner. As to the legal title to the property being in the executors, that will not make them partners. Suppoſe one of ſeveral partners becomes bankrupt, the legal property in his ſhare paſſes to his aſſignees; but can it be contended that thereby they would become partners with the ſolvent members of the firm? If not, neither will theſe executors. If it were otherwiſe, great inconvenience would follow.

Lord ELLENBOROUGH C. J. The fund ſubſiſting at the death of the teſtator, under a due adminiſtration of the will, ſhould have been diſpoſed of by the executors, and converted into money, and diſtributed as aſſets. Inſtead of that, it is embarked de novo in the trade in the purchaſe of other barley, and a variety of other contracts, to which the infant is not privy, nor bound by them, but may renounce when ſhe comes of age, as damnoſa

damnosa hæreditas. If then the infant has such an option, who but the executors can be liable?

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GROSE J. The difficulty is if the executors are not liable, to say who is.

LE BLANC J. The fallacy lies in the argument, that the executors are not concerned in the profit and loss. It is true they do not receive any thing for themselves, but carry their receipts to the account of the infant; but supposing this trade had proved a losing concern, the infant would not have been liable, for the executors could not bind her. In an indictment for larceny, the property must have been laid in the executors: so, if an action had been brought for it, it must have been in their names. It seems to me that the executors, by embarking the property in trade in the first instance, contracted a responsibility in a court of law, which their subsequent application of the profits to purposes not of personal benefit, cannot afterwards vary.

BAYLEY J. The executors in this case are mere volunteers. At law they became the legal proprietors in respect of every thing belonging to the trade; and consequently are liable to the legal debts.

Judgment for Plaintiff.

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GLADSTONE and Another *againſt* CLAY.

Tueſday, May 18th.

Where a policy of aſſurance was on goods at and from *Pernambuco* to *Maranham* and from thence to *Liverpool*, beginning the adventure on the goods from the loading thereof, on board the ſhip *whereſoever*: Held that it would cover goods previouſly loaded at *Liverpool*, and which arrived at *P.*, but were not unloaded there, and afterwards ſuſtained a partial loſs by wreck in the voyage from *P.* to *M.*

THIS was an action upon a policy of aſſurance on goods, on board the *Blanchard*, at and from *Pernambuco* to *Maranham*, and at and from thence to *Liverpool*, beginning the adventure upon the ſaid goods from the loading thereof, on board the ſaid ſhip, *whereſoever*, &c., with liberty for the ſaid ſhip to touch at any ports whatſoever and whereſoever, &c., and by a memorandum indorſed on the policy, the inſurance was declared to be on goods or ſpecie, both or either, valuing cotton at 10l. per bale, and the milrea as converted at *Pernambuco* at 75d. or 6s. 3d. each. At the trial before *Bayley* J. at the *London* ſittings in laſt *Trinity* term, a verdict was found for the plaintiffs, ſubject to the opinion of this court on the following caſe:

The plaintiffs, who were owners of the ſhip *Blanchard*, in the beginning of the year 1811 loaded her at *Liverpool* with *Britiſh* manufactured goods to the amount of 5000l. for *Pernambuco*. By the bills of lading, the whole of the ſaid goods were to be delivered there, and the inſtructions to the plaintiffs' agents were to ſell the whole at *Pernambuco*, and to ſend the veſſel back from thence to *London*. The ſhip ſailed from *Liverpool* upon this voyage on the 24th of *January* 1811, and arrived at *Pernambuco* on the 15th of *March* following. She remained there for the purpoſe of diſpoſing of the outward cargo about five weeks, during which time the whole was diſpoſed of and landed, except twenty-ſix caſes of manufactured goods, of which the agents for the plaintiffs being unable

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able to diſpoſe at *Pernambuco*, or to obtain freight there for *London*, reſolved to ſend the ſhip with the twenty-ſix caſes of goods to be diſpoſed of at *Maranham*; and that ſhe ſhould proceed from thence to *Liverpool*. The ſaid agents put on board at *Pernambuco* on account of the plaintiffs, a conſiderable quantity of ſpecie, fuſtic, and other goods, to be carried to *Maranham*, and from thence to *Liverpool*; and the twenty-ſix caſes of the outward cargo were never unloaded at *Pernambuco*, but remained conſtantly on board the ſhip until the loſs. On the 28th of *April* ſhe ſailed from *Pernambuco* for *Maranham*, and on the fourth of *May*, while proceeding for that port, was totally wrecked; whereby all the goods on board ſuſtained a partial damage. The plaintiffs have been paid the loſs upon the goods ſhipped at *Pernambuco*, and a ſufficient ſum as a return of premium for ſhort intereſt, if the policy did not attach upon the twenty-ſix caſes of the outward cargo.

The action was brought for the loſs ſuſtained upon the twenty-ſix caſes of the outward cargo, the amount of which was agreed to be ſettled out of court, if the plaintiffs were entitled to recover. The queſtion for the opinion of the Court is, whether the policy of aſſurance on the homeward voyage attached upon the ſaid twenty-ſix caſes of outward cargo ſo loaded at *Liverpool*. If the Court ſhould be of opinion that it did attach, the verdict is to ſtand for ſuch ſum as ſhall be adjuſted out of court, if not a nonſuit is to be entered.

Campbell for the defendant was called upon by the Court, who contended, that notwithſtanding the adventure

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venture was to commence from the loading of the goods whereſoever, ſtill it could not be conſidered within the meaning of the policy, that any part of the outward cargo ſhould be protected by it. The underwriter at the time of his ſubſcription, could not have contemplated that on a voyage from *Pernambuco* to *Liverpool*, goods loaded at *Liverpool* were to be the ſubject of his inſuranee. Neither could the aſſured have forſeen that a part of the outward cargo would remain unſold, ſo as to render ſuch an inſurance neceſſary. That the parties looked to a cargo which ſhould be loaded at *Pernambuco* is apparent from the valuation being only upon cotton and milreas as computed at that place, and not upon any of the caſes of goods which compoſed the outward cargo. He cited *Hodgson* v. *Richardſon* (*a*), and *Spitta* v. *Woodman* (*b*), as a ſtronger caſe in favour of the aſſured than the preſent; becauſe there the underwriter, at the time of his ſubſcribing the policy, was aware that the goods were in a loaded ſtate at an anterior port; and yet upon a policy beginning the adventure from the loading of the goods, it was held a good objection that they were not loaded at the port from which the voyage was to commence. With reſpect to the word *whereſoever* in this policy, it muſt be conſtrued like the words "any port whatſoever," which are confined to ports within the limits of the voyage: it only means whereſoever in the courſe of the voyage inſured the goods may be loaded. It was uſed for the purpoſe of covering any goods which might be loaded either at *Maranham* or on the coaſt of *Brazil*. If it is to be extended farther, it may be aſked when did the

(*a*) 1 *Black.* 463. (*b*) 2 *Taunt.* 416.

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policy attach upon theſe goods? Surely not at the moment of the ſhip's arrival at *Pernambuco*, for the goods were deſigned for the market at that place. The underwriter could not be liable whilſt it remained uncertain whether the goods would be diſpoſed of, or would form a part of the homeward freight. And ſuppoſing he would be liable when that was determined, ſtill, unleſs it was ſhewn that at that time the goods were in good ſafety at *Pernambuco*, the underwriter might be made liable for anterior damage. He then referred to *Parkin* v. *Tunno* (*a*), *Horneyer* v. *Luſhington* (*b*), *Langhorn* v. *Hardy*, *Same* v. *Cologhan*, C. P., in which laſt caſes *Spitta* v. *Woodman* was recognized; and urged that it would be overruling all thoſe caſes to decide in favour of the plaintiff.

Lord ELLENBOROUGH C. J. In this caſe the aſſured have induſtriouſly laboured to withdraw themſelves from the poſſibility of any cavil ariſing out of the conſtruction or miſconſtruction of former caſes. Being reſolved to cover their intereſt whether the goods ſhould be loaded on board at *Pernambuco*, or whether the unexhauſted reſidue of the outward cargo ſhould happen to form a part of that which ſhould become deſtined for the homeward voyage, they very rationally, with reference to the late deciſions, introduced the word "whereſoever." We well know that in adventures of this kind to the coaſt of *South America*, it has frequently happened that a portion of the outward cargo remains undiſpoſed of at the deſtined market, and the ſhip is obliged to return home with the ſame goods. No doubt this inſurance

(*a*) 11 *Eaſt*, 22. (*b*) 15 *Eaſt*, 46.

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looked to a case of that sort, and was meant to protect it. It is therefore provided that whereſoever the loading takes place the policy is to attach; the word "whereſoever" being, as to the place of loading the goods, a word of the largeſt extent; but not enlarging the extent of the damage, for which the underwriter is to be liable, which ſtill muſt be confined to damage accruing within the limits marked out by the policy, viz. from *Pernambuco* to *Liverpool*. It has been aſked at what time the riſk attached upon theſe goods: to which it may be anſwered, either from their arrival at *Pernambuco*, or at all events from the time when they were deſtined for the homeward voyage. It certainly throws ſome difficulties in the way of this conſtruction, and that affords the only ground of argument, that it may poſſibly aid in covering a damage which happened to the goods before the commencement of the riſk. But when we conſider that the aſſured is bound to prove that the loſs happened within the limits of the voyage inſured, that difficulty is in a great meaſure removed. Here the damage is ſtated to have ariſen from wreck between *Pernambuco* and *Maranham*. Under theſe circumſtances, unleſs we are to pronounce that it is not competent to the parties to a policy, by the introduction of words of the moſt general and comprehenſive meaning, to protect an intereſt on goods without reference to any particular limits within which they are to be loaded, ſo that at whatſoever place they may be loaded, if the damage ariſe within the voyage inſured, the underwriter ſhall be liable; I cannot conceive any words more effectual for attaining that object than the words here uſed.

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GROSE J. It is impoſſible to recollect what was decided in the former caſes, and not perceive with what view the word "whereſoever" was introduced into this policy.

LE BLANC J. If the conſequences announced in argument, namely, the overruling all former caſes upon the ſubject, were likely to follow from this deciſion, I think the Court would pauſe before they proceeded to ſuch a length; but none of the caſes, from *Robertſon* v. *French* (*a*) down to *Langhorn* v. *Hardy*, contain words ſimilar to the preſent. Therefore this deciſion will not affect other contracts framed in different terms. The words in former caſes were either beginning the adventure from the loading on board the ſhip, or from the loading at the place where the riſk was to commence, or from the loading as aforeſaid, which are words of reference; but I am not aware that the Court has been called upon to decide a caſe where the words were the ſame as or equivalent to the preſent. The words here are from the loading on board whereſoever. The only queſtion is whether the Court will give effect to the word "whereſoever," by conſtruing it any place whatſoever, or will reſtrain it to *Pernambuco*, and ſuch places as the ſhip might touch at in her voyage from *Pernambuco*. It is ſtated that the damage aroſe, not at *Pernambuco*, but in the courſe of the voyage from that place; therefore it becomes unneceſſary to fix upon the preciſe point of time when the policy attached: it will be time enough to determine that, when the queſtion ariſes. Then the word whereſoever ſeems clearly to have been

(*a*) 4 *Eaſt*, 130.

intended

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intended to take it out of the former cases, where the policy was either left in blank, or filled up with a place. The underwriter, when he read the policy, cannot be supposed to have read the word wheresoever as it is used with reference to the loading of the goods, in the same sense which it bears when applied to the liberty to touch at any ports. It therefore seems to me that the Court is bound to give it the most extensive signification, so as to meet the intention of the parties.

BAYLEY J. The object of the insurance was to cover the goods in the course of the voyage insured. It makes little difference to the underwriter whether the goods are loaded on board in the course of the voyage, or whether the outward cargo is converted into a part of the homeward cargo. In the former cases, the Court was tied down by the express words of the policy, contrary to the intention of the parties; for, in some of them, the underwriters knew perfectly well that it was the object of the assured to load the goods before the commencement of the risk. Here, it being probable that a portion of the outward cargo might be returned on hand, a very extensive word was therefore introduced. Wheresoever may mean either wheresoever in the course of the voyage, or in a larger sense, wheresoever, without confining it to the voyage. If it may have both senses, why may it not have the larger? more especially, if such appears to have been the intention of the parties. As to the question when the policy attached, it is not necessary to determine the exact point of time, whether it was when the assured resolved not to unload any more of the goods, but to send the remainder on to *Maranham*; but I should say that it clearly attached when the ship left *Pernam-*

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Pernambuco. The queſtion, when the aſſured changed the outward into a homeward cargo, would be for a jury; and when they were ſatisfied that it conſtituted a part of the homeward cargo, then the policy would attach. It is ſaid that then the underwriters might be liable for antecedent damage; but I think not. The aſſured is bound to prove that the damage occurred during the voyage covered by the policy: if that was left in doubt, he would not be entitled to recover. He can only recover in reſpect of ſuch part of the cargo as was found at the time when the policy attached. As to that the onus is on the aſſured.

Judgment for Plaintiff. (*a*)

Scarlett was for the Plaintiff.

(*a*) See 16 *Eaſt*, 240, *Bell* v. *Hobſon*.

DOE, on the Demiſe of EMMETT, *againſt* THORN.

Tueſday, May 18th.

If the Sheriff ſell a term under a writ of *fi. fa.* which is afterwards ſet aſide for irregularity and the produce of the ſale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term againſt the vendee under the ſheriff.

EJECTMENT for lands in the pariſh of *Ealing* in the county of *Middleſex*. Demiſe laid 26th *April* 1811.

At the trial before Lord *Ellenborough* C. J. at the *Middleſex* ſittings after *Michaelmas* term 1812, a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the following caſe:

On the 26th *November* 1805 the leſſor of the plaintiff being poſſeſſed of the premiſes in queſtion, under a leaſe granted to him for a term of 14 years of which ſeveral were then unexpired, and being alſo indebted to one *Bullen* in a ſum of money, the payment of which was

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secured to *B.* by a warrant of attorney, *B.* signed judgment thereon, and issued a *fieri facias* directed to the sheriff of *Middlesex* to levy 3205*l.* on his (the lessor of the plaintiff's) effects. The sheriff accordingly took the said lease and sold it under the execution to the defendant for 500*l.*, and afterwards assigned it to him and delivered possession; and the defendant continued in possession at the time of bringing this ejectment. Soon after the sale, it being discovered that the execution was irregular, a rule was obtained and made absolute in this court in *Trinity* term 1806, directing that the writ of *fieri facias* and the levy under it should be set aside for irregularity with costs; and that the money levied and in the hands of the sheriff should be returned to the lessor of the plaintiff; except as to the amount of a debt to be paid by him to the plaintiff in another action, then pending against him.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If the Court should be of this opinion, the verdict is to stand; if not, a nonsuit is to be entered.

Espinasse for the plaintiff, contended that the authority of the sheriff which was derived from the writ of *fieri facias* was vacated as soon as the writ was set aside, for by setting it aside, it is as if the writ had never been, and consequently the sale under it became void; and he referred to *Turner* v. *Felgate*, (*a*) where the plaintiff was permitted to recover in trespass against the defendant for taking his goods upon an execution which was afterwards set aside for irregularity.

(*a*) *T. Raym.* 73.

Lord

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Lord ELLENBOROUGH C. J. Is the leſſor of the plaintiff entitled to hold the money paid as the price of his term, and to recover the term alſo? In the very caſe cited, the plaintiff afterwards brought *ſcire facias* to have reſtitution of his goods taken under the execution, for which he had already recovered damages: but the Court ſuperſeded it, as being a very unreaſonable thing that he ſhould have double ſatisfaction. Here the judgment was not ſet aſide; therefore a freſh execution might have been ſued out on the very ſame day. The term was legally ſold, for the ſheriff had authority to levy the money, and the property paſſed by the ſale.

Bayley J. The leſſor of the plaintiff agreed by the rule to take the money; it was his own fault therefore if he did not. In the caſe cited treſpaſs could not have been maintained againſt the ſheriff.

Per Curiam, Judgment of Nonſuit.

Gurney for the defendant, mentioned ſeveral authorities (*b*) to ſhew that a party ſhall not be reſtored to his term again after a ſale by the ſheriff under a *fieri facias*.

(*b*) *Dyer* 363. *pl.* 24. 5 *Rep.* 90, *b.* 8 *Rep.* 96, *b.* 143. But it ſeems otherwiſe if the term be extended upon elegit, or forfeited on outlawry and ſold, and the judgment or outlawry be reverſed. *Cro. Jac.* 246. *Cro. Eliz.* 278.

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DOE, on the Demiſe of SARAH BORWELL, *againſt* ABEY.

Deviſe to the three ſiſters of the teſtator for and during their joint natural lives, and the natural life of the ſurvivor, *to take as tenants in common and not as joint tenants;* Remainder to truſtees during the reſpective lives of the ſiſters and the life of the ſurvivor, to preſerve contingent remainders; and from and after their reſpective deceaſes and the deceaſe of the ſurvivor remainder over: Held that the ſiſters either took the eſtate as jointenants to be regulated in its enjoyment as a tenancy in common; or as tenants in common with benefit of ſurvivorſhip.

EJECTMENT for certain freehold lands in the parish of *Graſby* in the county of *Lincoln.* A verdict was found for the plaintiff before *Groſe J.* at the laſt aſſizes for the ſaid county, ſubject to the opinion of the Court upon the following caſe:

William Borwell being ſeized in fee of the premiſes in queſtion by his will dated the 6th of *April* 1777, after deviſing all his meſſuages, cottages, lands, tenements, and hereditaments, &c. to his wife for and during her widowhood, or until ſuch child as he ſhould happen to have by her ſhould attain 21, remainder to truſtees during the continuance of ſuch eſtate to preſerve contingent remainders, remainder to the uſe of all and every his ſons and daughters on the body of his ſaid wife, begotten or to be begotten, and the heirs of the body of ſuch ſons and daughters ſeverally and reſpectively as tenants in common and not as joint tenants; and in caſe any of ſuch ſons or daughters ſhould happen to die without iſſue, the ſhare of him, her or them, ſo dying without iſſue, to the uſe of the ſurvivors or ſurvivor, and of the heirs of his, her, or their bodies as tenants in common and not as joint tenants; and for default of ſuch iſſue he deviſed thus: "I give and deviſe all "my ſaid meſſuages, cottages, lands, tenements, and he- "reditaments unto my three ſiſters *Elizabeth Richardſon,* "*Mary Whitehead,* and *Sarah Borwell, for and during* "*their joint natural lives and the natural life of the ſurvivor* "*of them, to take as tenants in common and not as joint* "*tenants.*

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" *tenants*. And from and after the determination of their " *respective* estates, then to my said trustees and their heirs " during the *respective lives of my said three sisters and the* " *life of the survivor of them*, upon trust, by the ways and " means aforesaid, to preserve the contingent estates herein- " after limited from being defeated or destroyed; and from " and after *the respective deceases of my said three sisters and* " *the decease of the survivor of them*, then as to one undivided " third part of the said premises to the use of my nephew " and niece, *John* and *Mary Richardson*, son and daughter " of my sister *E. Richardson*, respectively for and during " their respective lives as tenants in common and not as " joint-tenants;" remainder to trustees to preserve contingent remainders; remainder after the respective deceases of the testator's said nephew and niece, to the use of the children of the said nephew and niece in tail general, with remainders over. And as to another undivided third part from and after the deceases of his said three sisters and the survivor of them, to the use of the children of *M. Whitehead* in tail general, with other remainders over. And as to the remaining undivided third part from and after the respective deceases of his said three sisters and the survivor of them, to the use of the children of *S. Borwell*, with other remainders over. The will also contained a bequest of personal property to the three sisters in the following terms: " I give and bequeath to my said three sisters the " sum of 20*l.* a-piece, to be paid to them respectively by " my executrix hereinafter named, within 12 calendar " months next after my decease. And my will is, that in " case any of my said three sisters shall happen to die " before her or their legacy or legacies shall become payable " as aforesaid, that then the legacy or sum of money " hereby intended for her or them on her or their so dying,

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"(whether the ſame be originally given, or ſhall afterwards "come to her or them by ſurvivorſhip, in purſuance "hereof,) ſhall go to and be equally divided among the "ſurvivors of them if more than one; but if but one to "ſuch ſurvivor only."—The teſtator appointed his widow ſole executrix of his will. *M. Whitehead* died without iſſue in 1778, in the lifetime of the teſtator. The teſtator died ſeized on the 20th of *June* 1783, without iſſue, and without altering or revoking his will; upon whoſe death his widow entered, and continued to hold the premiſes until her ſecond marriage in 1790; when the leſſor of the plaintiff and *E. Richardſon*, the two ſurviving ſiſters of the teſtator took poſſeſſion and demiſed the premiſes to the defendant, who paid rent to them in moieties. *E. Richardſon* died ſome years ago, and after her death, the defendant married her daughter *M. Richardſon* mentioned in the will, and has continued to pay rent for a moiety of the premiſes to the leſſor of the plaintiff. *J. Richardſon* the teſtator's nephew, alſo mentioned in the will, died without iſſue in his mother's lifetime. The defendant was in poſſeſſion of the premiſes when the ejectment was brought, but had been regularly ſerved with a notice to quit by the leſſor of the plaintiff; at the expiration of which notice the poſſeſſion of the whole of the premiſes was demanded and refuſed. The defendant entered into the common conſent rule to defend without confeſſing ouſter, unleſs an actual ouſter of the leſſor of the plaintiff ſhould be proved; and no actual ouſter of the leſſor of the plaintiff was proved, except as above ſtated. The queſtion for the opinion of the Court is, whether the plaintiff is entitled to recover.

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Copley for the leſſor of the plaintiff, who claimed the whole of the premiſes as the ſole ſurviving ſiſter, propoſed to read the deviſe as if it had been to the three ſiſters, for and during their joint natural lives and the natural life of the ſurvivor, without the ſubſequent words "to take as tenants in common and not as joint tenants:" which being inconſiſtent with the former part of the deviſe, and alſo repugnant to the general intent of the teſtator, the Court will intend that they crept in by miſtake; and, according to an eſtabliſhed rule of conſtruction, reject them. The general intent was, that the limitation over ſhould not take effect until after the death of the ſurvivor of the three ſiſters; which is apparent from the limitation to the truſtees to ſupport contingent remainders, not merely during the reſpective lives of the ſiſters, which would have been enough if he intended them to take as tenants in common; but during their reſpective lives and the life of the ſurvivor. Again, the three parts are not to go over in ſucceſſion as the lives of each of the ſiſters dropped; but the whole is to go over in undivided third parts upon the death of the ſurvivor of them. And in *Furſe* v. *Weeks* (*a*) it is laid down that in a will, although there be words which ſhew an intent to create a tenancy in common, yet if there be other words which ſhew a ſtronger intent to create a jointenancy, ſuch interpretation ſhall prevail. And in a former clauſe of this will where the teſtator meant that his ſons ſhould take as tenants in common, he has ſo provided in unambiguous terms. Then the deviſe of the real eſtate may be explained by that of the perſonal, where the teſtator plainly creates a

(*a*) 2 *Roll. Abr.* 90. *pl.* 5.

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ſurvivorſhip amongſt the ſiſters: and ſuch a diſpoſition of the perſonalty was much relied upon by Lord Hardwicke in *Hawes* v. *Hawes* (*a*), to explain a deviſe not very unlike the preſent, upon which he held that the deviſees took by ſurvivorſhip. And perhaps all the words of this will may be reconciled by giving the ſiſters the benefit of ſurvivorſhip, although they may take as tenants in common.

J. Balguy, contrà. Although it may be admitted, that if there are inconſiſtent and contradictory words in a will, the Court will reject ſome of them; yet if a reaſonable conſtruction can be given to the whole, ſuch conſtruction ſhall rather prevail. The firſt words by which it is given to them and the ſurvivor of them certainly import a jointenancy; but the ſubſequent words denote a plain intention, that they ſhall take as tenants in common; and the word ſurvivor ſhall not deſtroy or control this plain intention. And ſo it was adjudged in *Bliſſet* v. *Cromwell* (*b*), upon a deviſe to two and their heirs, and the longer liver of them, equally to be divided; which is not ſo expreſſive of a tenancy in common as the preſent; and the ſame was ruled in *Stones* v. *Heartly* (*c*). But it is ſaid that it may be a tenancy in common with benefit of ſurvivorſhip; which is the ſame argument that was uſed and rejected by Lord *Mansfield* as too refined, in *Roſe* v. *Hill* (*d*); and the Court there conſidered the word ſurvivor, as inſerted to prevent a lapſe, and to mean ſuch as ſurvived the teſtator. As to *Hawes* v. *Hawes*, the words were "with benefit of ſur-

(*a*) 1 *Wils.* 166. (*b*) 3 *Lev.* 373. *S. C. Salk.* 226.
(*c*) 3 *Burr.* 1886. cited in *Roſe* v. *Hill*. (*d*) 3 *Burr.* 1881.

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"vivorſhip," which neceſſarily implied ſurvivorſhip among themſelves. Here are no ſuch words; and if the eſtate did not ſurvive upon the death of *E. Richardſon*, the defendant will be entitled to her moiety as ſpecial occupant. The clauſe relating to the perſonalty ſhews that the teſtator knew how to uſe apt words to create ſurvivorſhip where he ſo intended.

Lord ELLENBOROUGH C. J. This is the caſe of a teſtator who has unfortunately fallen into the uſe of technical expreſſions, which he did not fully comprehend. It remains for us to ſay, whether amidſt this cloud of obſcurity which he has thus raiſed, we can collect his meaning. I think the cardinal point, upon which we may rely in order to collect his intention, turns upon the words preceding the limitation over and upon which it is given, which are theſe, "from and "after the reſpective deceaſes of my ſaid three ſiſters, "and the deceaſe of the ſurvivor of them." That is the time, and it is not before that time, when the remainder over is to take effect. Now, unleſs the ſiſters take by ſurvivorſhip, what is to become of the reſpective portions of the eſtate in the interval? The learned counſel has ſuggeſted, that the heir would take them as ſpecial occupant; but it ſeems to me, that there is no occaſion to reſort to ſuch an expedient; for the whole will is made intelligible by conſtruing the words, to take as tenants in common, as rather regulating the mode of enjoyment, than as deſcribing the preciſe eſtate which the ſiſters ſhould take. The words are, "unto my three ſiſters for and during their joint natural lives and the natural life of the ſurvivor, to take as tenants in common, and not as joint tenants." To take as tenants

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in common is, correctly ſpeaking, repugnant to taking with benefit of ſurvivorſhip; but if thoſe words are underſtood to mean that they were to enjoy it as tenants in common, which they might do with benefit of ſurvivorſhip, then the only repugnancy ſeems to be in the words, and not as jointenants. I would preſerve the words to take as tenants in common; the words tenants in common are of flexible meaning, and may be underſtood, that although they ſhould take by ſurvivorſhip as jointenants, yet the enjoyment was to be regulated amongſt them, as tenants in common. The prevailing intention of the teſtator ſeems to have been that the eſtate ſhould not go over until the death of the ſurvivor. The words upon which I commented and relied in the outſet, clearly manifeſt ſuch an intention.

GROSE J. I think the conſtruction which my Lord has put on the will comes the neareſt to the teſtator's intention.

LE BLANC J. The teſtator having reſtrained the limitation over "until after the death of the ſurvivor," makes the caſe ſomewhat different from what it would have been, if the deviſe had been confined to the ſiſters themſelves. In the caſes cited for the defendant, there were no limitations over to help the conſtruction. The bequeſt of the perſonalty is properly prayed in aid as a key to the meaning of the teſtator, that he intended that the ſiſters ſhould alſo take the real eſtate in ſurvivorſhip.

Bayley J. The fair conſtruction is to treat it as a deviſe to the ſiſters as tenants in common with benefit of

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ſurvivorſhip, and thereby give effect to all the words. A tenancy in common with benefit of ſurvivorſhip is a caſe which may exiſt, without being a jointenancy; becauſe ſurvivorſhip is not the only characteriſtic of a jointenancy. There is one view in which it might be important to the teſtator to create a tenancy in common with ſurvivorſhip, and yet not a jointenancy. It might be important in this view, becauſe if it were a jointenancy, one jointenant might by means of a leaſe made during her life, convey to her leſſee a title paramount to that of the ſurvivors. It might therefore be the object of the teſtator to obviate ſuch a conſequence which would in effect defeat his intention.

Poſtea to the Plaintiff.

The KING *againſt* MATHIAS KERRISON.

Wedneſday, May 19th.

ERROR to reverſe a judgment on an indictment, given by the juſtices at the quarter ſeſſions for the county of *Norfolk*, againſt the defendant for not repairing a common bridge. The indictment ſtated in the firſt count, that a certain common and public bridge over a navigable cut, channel, canal, or watercourſe, in the pariſh of *Ditchingham* in the county of *Norfolk*, in a certain highway there was and yet is in great decay, &c.; and that the defendant, *by reaſon of his being the owner and proprietor* of the navigation mentioned in a certain act of parliament, made in the 22d year of the reign of *Car.* 2. intituled "an act for making navigable the rivers commonly called *Brandon* and *Waveney*," ought to repair and amend the ſaid common bridge, &c. The 2d count charged that a certain

Indictment charging an individual with the repair of a bridge *by reaſon of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reverſed. It ſeems that a count charging him by reaſon of being owner of a navigation under a *private* act of parliament, muſt ſet forth the act.

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a certain common and public bridge over a navigable cut, channel, canal, or watercourſe, in the pariſh of *Broom* in the county of *Norfolk*, in a certain highway there was and yet is in great decay, &c.; and that the defendant *by reaſon of his being owner and proprietor of the ſaid navigation* ought to repair, &c. The laſt count charged that there was and ſtill is a certain highway &c., and alſo a certain common and public bridge in the ſaid highway over a certain canal, &c., and that the ſaid bridge was and yet is in great decay, &c.; and that the defendant *by reaſon of his being owner and proprietor* of a certain navigation in, through and along the ſaid canal, of right ought to repair, &c. Plea not guilty. The common errors were aſſigned.

Abbott in ſupport of the writ of error, took ſeveral objections. To the firſt count, that the act of parliament being a private act, ſhould have been ſet forth, as the Court could not take judicial notice of it. To the ſecond count, which charged the defendant, by reaſon of his being owner of *the ſaid navigation*, that if the words *ſaid navigation* were to be taken as referring to the navigation in the firſt count, it was open to the ſame objection as the firſt: if they referred to the navigable cut mentioned in the inducement to the ſecond count, it came within the objection to the laſt count. To the laſt count he objected, that the allegation by reaſon of being owner and proprietor of a certain navigation, does not amount to any legal obligation upon the defendant to repair. This will be apparent by reference to a few principles of law. By the common law, the county is chargeable with the reparation of public bridges, in the ſame manner as the pariſh is with that of

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public highways. An individual may become chargeable with the repair of either, by reaſon of the tenure of lands or tenements (*a*). In 1 *Hawk.* c. 76. ſ. 8. it is laid down "that a corporation aggregate may be bound by force of a general preſcription that it ought and hath uſed to repair, without ſhewing that it has been uſed to do ſo in reſpect of the tenure of certain lands or for any other conſideration; but an individual cannot be charged with ſuch a duty by a general preſcription from what his anceſtors have done." It is, however, added, "that an indictment charging a tenant in fee ſimple with having uſed of right to repair ſuch a way *ratione tenuræ* is certain enough, without adding that his anceſtors, or thoſe whoſe eſtate he hath, have always ſo done, for that is implied in ſuch charge;" and *Rex* v. *Spiller* (*b*) is to the ſame effect. According to theſe authorities, therefore, it appears that the words *ratione tenuræ* are equivalent to charging the individual in a que eſtate; it is a conciſe form, importing that he holds the land on the ſervice of repairing, and that the land was originally granted to him on that condition. [Lord *Ellenborough* C. J. aſked if ownerſhip was not alſo a compendious expreſſion, compriſing the entire intereſt in the ſoil as well as the tenure upon which it is holden]. Owner and proprietor import neither tenure nor ſervice; at the utmoſt, they import only the entire intereſt free of any condition, and not a grant of the land upon condition. The term *ratione tenuræ* is become a known term of art; which like other terms of art has its peculiar meaning; and in ſome caſes they cannot be ſupplied by any periphraſis; as in an indictment for

(*a*) 2 *Inſt.* 700. (*b*) *Styles*, 109.

murder

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be some contract or obligation annexed to the original grant under which he takes, to induce such liability. But there is no allegation in this count of any such obligation, or of any grant from which it might be presumed to result: but the allegation is simply by reason of his being owner and proprietor. What words then are there of equivalent import with *ratione tenuræ*, *i. e.* by reason of an obligation resulting from an original grant? The words already cited do not appear to be; for *ratione tenuræ*, by the technical sense which has been given to them, embody the condition upon which the land was granted; these words do not. Ownership at the utmost imports only estate and quantity of interest. Suppose then the words owner and proprietor to import *liberum tenementum*, or the entirety of the interest; still there are wanting all words which import condition. It appears therefore to me, that if we were to give effect to these words, we should be adopting a fanciful deviation from an established form of pleading; and where a relaxation has already been introduced by the words *ratione tenuræ*, we are not at liberty to impart the same effect to some other words, as being equivalent. We ought not to depart from ancient forms, unless there be an adequate reason for such departure. I therefore think this form of pleading is defective.

Grose J. If there is a substantial reason why old forms of pleading should be observed, I should be for observing them. It is contended, that by reason of being owner and proprietor is equivalent to *ratione tenuræ*. I think not, for the reasons which my Lord has so pointedly given.

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LE BLANC J. It is admitted in argument, that this would be the firſt inſtance of the Court's upholding an indictment framed as this is in other than the technical language of the law; by which an individual, who is charged with the reparation of a bridge, muſt be charged "by reaſon of tenure;" or if it be the caſe of a corporation, it may be done by general preſcription. When, therefore, a new form of allegation is attempted to be introduced, it behoves the Court, before they give ſanction to it, to ſee clearly that the allegation is tantamount in every reſpect to that for which it is ſubſtituted, and which has been the long eſtabliſhed form. Upon this ſubject much argument has been uſed to ſhew that the words, by reaſon of being owner and proprietor, are the ſame as *ratione tenuræ*. But I think the argument has failed in eſtabliſhing that point. *Ratione tenuræ* implies *ex vi termini* ſomething originally annexed to the holding. And this inconvenience would certainly reſult from the adoption of this mode of pleading; that it would let in a more lax medium of proof, and bring more of law before the conſideration of a jury than is neceſſary; for this form would admit of the production of every ſpecies of evidence by which a perſon could in any way be made chargeable. The Court ought not to ſanction this. Two caſes have been referred to, in both of which the circumſtances under which the obligation ſubſiſted, were ſpecially ſet forth in pleading: in the ſpecial pleas in thoſe caſes, the nature of the obligation is particularly ſet out. It would be a ſufficient argument with me to decide this caſe, to ſay that the Court ought to make their ſtand againſt theſe innovations in the firſt inſtance.

BAYLEY J. concurred.

Judgment reverſed. (*a*)

(*a*) *See* 2 *Ld. Raym.* 792. 804. *Regina* v. *Sir I. Bucknall.*

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Wednesday, May 19th.

PRICE *against* JACKSON.

The Court set aside a latitat directed to the sheriff of *Middlesex* for irregularity.

ANDREWS shewed cause against a rule obtained by *Comyn*, for setting aside a latitat for irregularity. The irregularity was, that this was a latitat directed to the sheriff of *Middlesex*. The case of *Kelly* v. *Shaw* (*a*) was relied upon, where the proceedings were held good, though the latitat was served in *Middlesex*.

But the Court held that this practice was irregular; and *Bayley* J. added, that a latitat and a bill of *Middlesex* were issued by different officers; and if the practice could be sustained, a bill of *Middlesex* would never be issued again.

Rule absolute.

(*a*) 6 *Term Rep.* 74.

Thursday, May 20th.

The KING *against* The Justices of LEICESTERSHIRE.

The Court will not grant a mandamus to the justices at sessions to rehear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal.

The justices at sessions may alter their judgment during the continuance of the sessions.

AN appeal against an order of two justices, for the removal of *William Clifton* and his children from the parish of *Market Harborough* to the parish of *Biddenham*, came on to be heard at the *Epiphany* quarter sessions for the county of *Leicester*, when the chairman, after hearing evidence on the part both of the respondents and appellants, pronounced the judgment of the Court,

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for confirming the order; but one of the juſtices who made the order, being preſent at the hearing of the appeal, inquired of the clerk of the peace whether he was not one of the juſtices making the order; and being anſwered in the affirmative, obſerved that it being contrary to a rule of that court, for juſtices who had made orders of removal to vote on the hearing of any appeal thereon, his vote in this caſe muſt conſequently be withdrawn; and therefore judgment muſt be for quaſhing, inſtead of confirming the order, as by taking away his vote the majority would be againſt confirming, and for quaſhing the ſame. The clerk of the peace thereupon entered the judgment of the Court for quaſhing, without perceiving at the time that by withdrawing the vote of the ſaid juſtice the votes of the remaining juſtices would be equal; whereon, by the rules of the court, an adjournment of the appeal ſhould have been entered, inſtead of a judgment to quaſh the order. Afterwards application was made to the chairman to rectify the judgment, but without effect. Under theſe circumſtances a rule niſi was obtained in the laſt term, for a mandamus to the juſtices to enter continuances on the ſaid appeal to the next general quarter ſeſſions, and then to hear and determine the ſame.

The Attorney-General and *Phillipps* ſhewed cauſe, and contended, that the amended order of ſeſſions for quaſhing the order of juſtices was final; it being competent to the ſeſſions during their continuance to alter or amend any order previouſly made; in the ſame manner as in the ſuperior courts during the term a rule or judgment may be amended, the term being conſidered for that purpoſe as but one day; and this Court will not

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afterwards take account of the poll, upon which final judgment was given in the court below, where, if any error had obtained, it might have been rectified.

Beauclerk and *G. Marriott*, in ſupport of the rule, ſaid that it appeared clearly from the affidavit that the amended order had been entered by the clerk of the peace through miſtake. It was his duty, according to the caſe of *Bodmin* v. *Warligen* (*a*), when the vote of the magiſtrate making the order was withdrawn, thereby making the remaining votes equal, to have entered an adjournment; and now the ſeſſions have no authority to proceed, without a mandamus. They alſo cited *R.* v. *The Juſtices of Weſtmoreland* (*b*); and ſaid that the Court, when the rule was moved for, were inclined in favour of the application.

Lord ELLENBOROUGH C. J. I cannot ſay what might have been my firſt impreſſion upon an ex parte ſtatement, made at the time when the rule was moved for; but it is my duty now, after having heard both ſides, to give judgment on more mature conſideration. If any error was made in the entry of the clerk of the peace, that error ſhould have been pointed out at the ſeſſions, while the Court was ſitting, and competent to reform its own errors, and to draw out a more correct judgment. If this application were entertained, the conſequence would be that this Court would have on all occaſions to look, not to the record alone, but to extraneous matter, in order to ſee how the judgment of the juſtices at ſeſſions was obtained. The Court will

(*a*) *Mich.* term, 23 *Geo.* 2. *Bott.* 733 5th edit. (*b*) *Ib.*

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not do this; nor, when judgment has been finally pronounced, will they hold a ſort of balloting-box to aſcertain the votes that were given, or whether they were correctly caſt up. If no judgment had been pronounced, the Court might have interpoſed; but here there is a judgment. The party who would have corrected the error ſhould have applied to the proper forum and in due time; and if it had been found that the numbers were equal, nothing would have been done upon it; for it would have been a nullity: but here no ſtep of that ſort was taken, but judgment was entered; and this Court cannot, in order to ſupply a remedy, exerciſe a juriſdiction which does not belong to them. If they did in this inſtance, they muſt in all others inſtead of looking to the reſult, look to the poll on which the judgment is founded.

GROSE J. It does not appear that the Court below entertained any doubt; if they had, they would have ſent a caſe for our opinion.

LE BLANC J. It appears by the affidavits on both ſides that judgment was entered for quaſhing the order of juſtices; and that this was known to the attornies on both ſides; and no application was made to the Court below while ſitting, to ſift or inquire into the error if any ſuch exiſted. But application is made to this Court, to inſtitute an inquiry upon the queſtion, how the numbers were compoſed at the time when judgment was pronounced. This Court ought not to countenance ſuch an application; inaſmuch as the error ſhould have been noticed at the time.

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BAYLEY J. Except in matters of a criminal nature we cannot look dehors the record. This Court cannot ſit as upon a ſcrutiny before an election committee. In *Bodmin* v. *Warligen* the objection appeared upon the entry of record, made by the clerk of the peace.

Rule diſcharged.

Thurſday, May 20th.

The KING *againſt* The Juſtices of OXFORDSHIRE.

The 16 *G.* 3. *c.* 30., which gives an appeal to the ſeſſions againſt a conviction for deer-ſtealing, requires the perſon appealing to give ſix days notice; and if an appeal be entered without notice, the ſeſſions have no authority to adjourn it to the next ſeſſions: where the ſeſſions did ſo adjourn the appeal, and at the next ſeſſions it was diſmiſſed for want of notice, the Court refuſed to grant a mandamus to the juſtices to rehear it.

THIS was a rule for a mandamus to the juſtices of *Oxfordſhire*, calling on them to enter continuances to their next quarter ſeſſions, upon an appeal againſt a conviction under the 16 *Geo.* 3. *c.* 30. for deer ſtealing. The conviction was made on the 13th of *July*, and an appeal againſt it entered at the next *Michaelmas* quarter ſeſſions; when, upon being called on, objection was taken that the ſix days notice required by *ſ.* 21. had not been given; and thereupon the juſtices entertaining doubts, reſpited the appeal until the next ſeſſions, in order to conſider the queſtion. On the 6th of *January* following the proſecutor was ſerved with notice to try the reſpited appeal at the *Epiphany* ſeſſions; at which ſeſſions the ſame objection was renewed, when the Court decided in favour of the objection, and diſmiſſed the appeal.

Abbott, upon ſhewing cauſe againſt the rule, referred to *ſ.* 21., which enacts that any perſon may appeal, &c. but the perſon ſo appealing is required and directed to give ſix days notice to the proſecutor, and to enter into a recognizance. He admitted that the appellant had entered into the recognizance required by that ſection, but

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he had not given notice; whereas the giving notice is as much a condition precedent to the right of appeal, as the entering into a recognizance. Both are included in and required by the ſame clauſe; and it is alſo provided that the appeal ſhall be to the ſeſſions next after the expiration of 20 days from the time of the conviction; ſo that there muſt always be time to give ſix days notice. As to any ſuppoſed analogy between this and the caſe of an appeal againſt a poor-rate, it is ſufficient to ſay, that the ſtatutes by which the latter is regulated do not ſpecify any particular time for giving notice; but only require notice generally, or a reaſonable notice. It may be argued that the words "but the perſon ſo appealing is required to give ſix days notice" are not words of condition, but only directory; but that argument goes too far, becauſe it would alſo make the clauſe only directory as to the recognizance. Then the ſeſſions had no authority to adjourn for want of notice, for the enactment clearly imports that the appeal ſhall be determined at the ſeſſions at which it is lodged: the words are, that "every ſuch appeal ſhall be then examined, and the matter then finally heard and determined." But by this practice of adjournment the party who neglects to give the ſix days notice, will be gaining an advantage which the act intended he ſhould not have.

Mackaneſs, contrà, admitted that no notice of appeal to the firſt ſeſſions had been given, but contended that the material requiſite directed by the act was the recognizance, which had been complied with and entered into. He referred to *The King* v. *The Juſtices of Wilts* (*a*) to ſhew that although an act giving an appeal to the ſeſſions

(*a*) 13 *Eaſt*, 352.

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direct the justices at the said sessions to hear and determine it, yet the justices have an incidental power of adjournment. He referred also to what was said by *Buller* J. in *The King* v. *The Justices of Yorkshire* (*a*); and relied upon the circumstance of the sessions having respited the appeal.

Lord ELLENBOROUGH C. J. In this case the only question is, whether a notice of appeal was not necessary; for if necessary, it is admitted that none has been given. An appeal is not a matter of common right, but of special provision. Then it may be given either absolutely or conditionally; and if no limits as to time be prescribed, it shall be understood that the appeal must be within a reasonable time. From the reign of Queen *Elizabeth* to that of *George* the First, appeals under the poor laws seem to have gone on without any statutable provision restricting the time of notice; until by the 9 *G.* 1. (*b*), reasonable notice was required to be given. But the statute now in question enacts, "that a person may appeal to the sessions next after the expiration of 20 days from the time of conviction, *but* the person so appealing is required to give six days' notice, and to enter into a recognizance." There are therefore two conditions annexed to this right of appeal. One of them, which is the giving notice, has not been complied with in this case. Of course, therefore, the appeal has never been duly entered; and if so, it could not be adjourned; for the sessions cannot acquire to themselves a jurisdiction by an act of their own. The power of adjournment is only incident, when the sessions cannot

(*a*) 3 *T. R.* 779. (*b*) *C. 7. s.* 8.

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conveniently hear the appeal after it has been duly entered.

GROSE J. I can give no other ſenſe to the words of the act than that which has been put on them by my Lord, that is, by reading the word *but* as a word of condition.

LE BLANC J. The clauſe muſt be read in the ſame ſenſe as if the words were that ſuch perſon may appeal *on giving ſix days' notice*, and entering into a recognizance; and had they been ſo, they would have been ſimilar to the words of the 13 *Geo.* 3. (*a*); upon which the Court have held, that the party not having given notice of appeal as required by that act, had no right to appeal (*b*). Here the party is required both to give notice, and to enter into a recognizance; and both are included in the ſame clauſe, and ſtand on the ſame ground. Suppoſing then the party can delay giving notice, he may delay alſo entering into a recognizance, and by that means the appeal would never be to the next ſeſſions, whenever it was the intereſt of the party convicted to delay the appeal. But the intent of the legiſlature ſeems to have been to compel an appeal to the ſeſſions, next after the expiration of 20 days from the time of the conviction. It would be nugatory therefore for the Court to order the ſeſſions to enter continuances, where the party had no right to enter the appeal originally.

BAYLEY J. concurred.

Rule diſcharged.

(*a*) *C.* 78. *ſ.* 19. 80. (*b*) *R.* v. *The Juſtices of Staffordſhire*, 7 *T.R.* 81.

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Friday, May 21ſt.

HAGEDORN *againſt* BELL.

Though a ſtate may be in the military poſſeſſion of one of two belligerents, that will not conſtitute her ſubjects enemies to the other belligerent, if the ſovereign power of the latter chuſes to permit a continuance of commerce with them: therefore where an inſurance was effected on property, ſhipped in this country on account of perſons who were domiciled at *Hamburgh*, at a time when that country was in the poſſeſſion of *French* troops, the ſenate continuing to exerciſe the powers of civil government in the ſame manner as before: Held that the aſſured were entitled to recover for a loſs which happened in the courſe of a voyage permitted by his majeſty's orders in council.

THIS action, which was commenced on the 7th of *June* 1811, was aſſumpſit upon a policy of inſurance effected by the plaintiff and ſubſcribed by the defendant for 300*l.*, on the 22d of *Auguſt* 1810, upon goods valued at 22,750*l.*, "at and from *London* to any port in the *Baltic*." The intereſt was averred in the firſt count to be in *Brothers Michahaëles*, Meſſrs. *Gouverin* and *Steinman*, and Meſſrs. *Bianconi* and *Lohman*, and the loſs to be by capture. Plea, general iſſue. At the trial before Lord *Ellenborough* C. J., at the *London* ſittings after *Hilary* term 1812, the jury found for the plaintiff, damages 300*l.* and coſts 40*s.*, ſubject to the opinion of the Court upon the following caſe:

The plaintiff is a merchant reſident in this country. The goods inſured were ſhipped by the plaintiff in *Auguſt* 1810, on account of, and by the order of the perſons in whom the intereſt is averred in the firſt count of the declaration, and who are all merchants domiciled at *Hamburgh*. On the 18th of *Auguſt* 1810 a licence was granted, in purſuance of an order of council of the ſame date, to the plaintiff by the name of *J. P. H. Hagedorn*, of *London*, merchant, on behalf of himſelf and other *Britiſh* merchants or neutral merchants, to permit them to load and export on board the veſſel *Emilie*, bearing any flag except the *French*, a ſpecified cargo, from *London* to any port in the *Baltic* not under blockade, &c. notwithſtanding the documents may repreſent the ſame

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to be deſtined to any other neutral or hoſtile port, and to whomſoever ſuch property may appear to belong.

In *September* 1810 the ſhip ſailed from *London* with the licence on board, on a voyage to *Swinemunde*, a port in *Pruſſia*. The ſhip arrived in *Swinemunde* roads, upon the 9th of *November* 1810. The ſupercargo went on ſhore and learnt from the *Pruſſian* commiſſary that it would be more ſafe to land the cargo at *Rugenwalde*, another *Pruſſian* port. The ſupercargo went by land to *Rugenwalde*, and the ſhip in the courſe of her voyage thither was captured by a *French* privateer, on the 4th *December* 1810, and the goods thereby became wholly loſt to the ſeveral perſons intereſted therein. Until the year 1811 *Hamburgh* claimed to be a ſovereign ſtate. In the month of *November* 1806 *French* troops arrived at *Hamburgh*, but the gates were ſhut againſt them, and they were refuſed admittance into the town; upon which they retired, but ſoon afterwards returned with ſuch an increaſe of numbers as the governor of *Hamburgh* could not reſiſt. They then obtained admittance by force, and remained in the town from that period until and at the time of the inſurance and loſs abovementioned, and from that time to the preſent have retained the occupation of *Hamburgh* by a military force. However, down to the end of the year 1810 the ſenate of *Hamburgh* continued in the full exerciſe of ſovereign civil authority, according to its ancient forms, and all the powers of civil government were adminiſtered in the ſame manner as they had always been, previous to the arrival of the *French*. The *Britiſh* merchants indeed were arreſted on the entrance of the *French* into the town, and remained under

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under a degree of reſtraint for about ſix weeks afterwards, but at the expiration of that time all reſtraint was taken off, and down to the end of the year 1810 the *Britiſh* in *Hamburgh* were unmoleſted, and carried on their trade and correſpondence as their occaſions required. On or about the 9th of *February* 1811, the ſenate of *Hamburgh* was depoſed by the *French* emperor, and a governor appointed by him was eſtabliſhed over *Hamburgh* and the other *Hanſe* towns; the arms of the city were then firſt removed from the ſenate houſe, and were no longer uſed, as they had been till that time to authenticate all public acts. From *November* 1806 up to 1811 all *Britiſh* ſhips and *Britiſh* commerce were excluded from the port of *Hamburgh*. *Hamburgh* from this latter time has been ſubject to the dominion of the *French*.

The caſe then ſet forth ſeveral orders in council iſſued by his majeſty, reſpecting the property belonging to the inhabitants of *Hamburgh* and places in the poſſeſſion of the *French*; which were of the following dates, viz., of the 18th of *February* 1807 (*a*), 26th *March* 1807 (*b*), 17th *June* 1807 (*c*), 11th *November* 1807 (*d*), 26th *April* 1809 (*e*), 17th *May* 1809 (*f*), 22d *June* 1811 (*g*).

The queſtion for the opinion of the Court is, whether the Plaintiff is entitled to recover. If the Court ſhall be of opinion that he is entitled, the verdict is to ſtand; if not, then the verdict is to be ſet aſide and a nonſuit entered.

(*a*) See printed Orders in Council, p. 28. (*b*) Ibid., p. 29.
(*c*) Ibid., p. 32. (*d*) Ibid., p. 52. (*e*) Ibid., p. 113.
(*f*) Ibid., p. 116. (*g*) Ibid., p. 132.

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Barnewall for the plaintiff; after premiſing that the ſame queſtion was depending in the caſe of *Hagedorn* v. *Bazett*, argued at Serjeant's-Inn, ſtated it to be this, viz., whether on the facts found in this caſe, the ſubjects of *Hamburgh* in *December* 1810 were alien enemies. Now that muſt be determined by a conſideration of what conſtitutes an alien enemy. According to the general underſtanding of that term, an enemy may be defined to be the ſubject of another country, with which the king is at war. In order therefore to conſtitute the ſubjects of *Hamburgh* enemies, it muſt be ſhewn that the mere act of the *French* government (a third ſtate) in occupying the town with a military force, placed it in a ſituation which obliged the ſovereign power of this country to conſider it as hoſtile; which is a propoſition that can never be ſupported, as long as it is acknowledged to belong to the ſovereign power of every ſtate to determine upon the relations of peace and war with any other ſtate. It is not enough to ſhew a juſt cauſe of war ſubſiſting, unleſs it has alſo been treated and acted upon as ſuch; therefore it muſt appear not only that *Hamburgh* was placed by the act of the *French* government in a poſition capable of being declared hoſtile by this country, but that ſhe was ſo declared. And this brings the queſtion to the orders in council, upon which it remains to be ſeen, what ſort of change in her relations towards this country they can be ſaid to have effected. He then went through the ſeveral orders ſtated in the caſe, and commented upon the effect of each, deducing this concluſion from the whole, viz., that *Hamburgh* was a ſtate, the ſubjects of which were permitted by the ſovereign power of this country to continue the relations of commerce with this and other countries; and whoſe

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property was to be respected, and what had been detained restored to them. He also referred to *Peschell* v. *Allnutt* in C. P. decided this term, from a MS. note; which was an insurance effected in *September* 1810, upon freight, on a voyage from *Gluckstadt* to this country. The ship belonged to a *Hamburgher*, and was captured in *October*; and after argument, in which the several orders in council were referred to, the court of common pleas had no doubt that the adventure was protected, *Hamburgh* being by those orders put upon the footing of a neutral.

Carr for the defendant, contended, upon the facts stated independently of the orders in council, that at the time when the insurance was effected, *Hamburgh* neither was, nor had the power of being neutral. The occupation of that state by a military force was not for a temporary purpose, but amounted to a complete conquest; and although it was permitted for a time to retain its ancient form of government, yet, in the end, when the conqueror so willed, it became annexed to France; and received, as in former ages when it was considered a boon to the vanquished, all the privileges of becoming a member of the empire. *Hamburgh* therefore passed under the dominion of another, and no longer formed an independent state from the time of her first occupation (*a*); and the rights incident to conquest vested in France from that time, however unjust the cause of her occupation might be, and notwithstanding the old form of government was continued. Such at least is the opinion of the writers on the law of nations. In *Vattel* (*b*) it is said, "every

(*a*) *Vattel. B.* 1. *c.* 1. *f.* 11. (*b*) *B.* 3. *c.* 13. *f.* 195.

"acquisition

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" acquisition obtained by a war in form is valid, inde-
" pendently of the justice of the cause, and the reasons
" which the conqueror may have for attributing to him-
" self the property of what he has taken. Accordingly
" among nations conquest has been deemed a lawful title,
" and has seldom, if ever, been disputed." And in a sub-sequent section (*a*), " The conqueror may rule his
" conquest as a separate state, and permit the form of
" government to remain." It is clear that *France* did not occupy *Hamburgh* as an ally. It was said indeed upon the argument at *Serjeant's Inn*, that *Hamburgh* never capitulated; but that circumstance shews more strongly the conquest to have been complete; for capitulation generally implies a surrender upon terms and conditions; whereas without a capitulation the surrender must be unconditional. So is the language of *Grotius* (*b*) " Sicut
" autem res, quæ singulorum fuerant, jure belli iis acqui-
" runtur qui eos sibi subjiciunt, sic et res universitatis eorum
" fiunt qui sibi subjiciunt universitatem, si ipsi velint.
" Nam quod de deditis dixit Livius, *ubi omnia ei qui armis*
" *plus potest dedita sunt, quæ ex iis habere victor, quibus*
" *multari eos velit, ipsius jus atque arbitrium est:* idem
" in bello solenni victis locum habet. Nam deditio sponte
" permittit, quod alioqui vis esset ereptura." And Livy (*c*) attributes the same consequences to victory, " quidquid
" Romani tot triumphis partum congestumque possident,
" id omne vestrum cum ipsis dominis futurum." But admitting, that *Hamburgh*, by retaining her powers of civil government might be considered during such period as *sui juris*, and competent to maintain the relations of neutrality; still she discovered no inclination to preserve those relations; for it is stated that British ships and

(*a*) *Ibid. f.* 201. (*b*) *Lib.* 3. *c.* 8. *f.* 4. (*c*) *Lib.* 21. *c.* 43.

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British commerce were expressly excluded from her port. And here, it must be remembered, that it is for the assured, who claims under a licence on behalf of neutral merchants, to make out the neutrality. Now *Vattel* (*a*) says, "Neutral nations in war are those who take no part "in it, remaining common friends to both parties, and "not favouring the arms of one to the detriment of "the other." Again in *Puffendorf* (*b*), Mr. *Barbeyrac*, in giving an abstract of the obligations of neutral nations not to favour one belligerent more than another, observes "that they ought not to furnish either of them "with things employed in war; and as for those that are "of no use in war, if they supply one side with them, "they must also the other." So *Bynkershoek* (*c*) in his chapter, "De statu belli inter non hostes." "Horum (*i. e.* qui simpliciter sunt amici) officium est, "omni modo cavere ne se bello interponant, et his quam "illis partibus sint vel æquiores vel iniquiores." Lord *Hale* also in treating of the nature of peace, classes under the last head (*d*), "leagues of simple amity, whereby "the one contracts not to invade, injure, or offend the "other; which (he says) regularly includes also liberty "of mutual commerce and trade." It may be asked then, how consistently with any of these rules the neutrality of *Hamburgh* can be sustained; which, according to some of them, did not amount to the lowest species of amity. After her port became interdicted to the commerce of this country, in compliance with the wishes and policy of *France*, it could no longer be considered as neutral. The case of the *Speculation* (*e*) so deter-

(*a*) *B.* 3. *c.* 7. *f.* 103.
(*b*) *B.* 8. *c.* 6. *f.* 7 *n.* 2.
(*c*) *Quæst. Juris. publ. lib.* 1. *c.* 9.
(*d*) 1 *Hale's P. C.* 160.
(*e*) 1 *Edw. Adm. Rep.* 184.

mined;

mined; although the country, of which the interdicted port forms a part, may not be at war with this country, and may have a general character of neutrality. And laſtly, in the caſe of the *Eliza Ann* (*a*), Sir *W. Scott* emphatically ſays, that if a country has ſhewn more favor to one ſide than to the other, if it has excluded the ſhips of one of the belligerents from its ports, and hoſpitably received thoſe of the other, it cannot be conſidered as acting with the neceſſary impartiality, to entitle it to the character of a neutral ſtate." He then concluded his argument with citations from the orders in council, 18th *Feb.*, 26th *March*, 17th *June*, and 11th *Nov.* 1807, from which he inferred, that thoſe orders could never have been iſſued by the government of this country, except upon an aſſumption that *Hamburgh* had then forfeited her neutrality.

Barnewall, in reply, denied that it was incumbent on the plaintiff to maintain the neutral character of *Hamburgh*, the onus being upon the defendant to ſhew that ſhe was an enemy. But even upon the queſtion of her neutrality, the authorities relied upon for the defendant rather ſhew that ſhe had forfeited her claim to be treated as neutral, than that the acts of the Britiſh government amount to a renunciation of her neutrality. And *Vattel* (*b*) expreſsly ſtates, that though the conduct of a neutral nation be not ſuch as it ought to obſerve, it is ſometimes connived at, and often permitted. Indeed the writers who have been quoted, treat rather of the reciprocal rights and duties of neutrals, than in what caſes a breach of thoſe duties may be conſidered as remitted; and therefore *Vattel* adds, "but "here we examine what may be done lawfully, and not

(*a*) 1 *Dodſon's Adm. R.* 244. (*b*) *B.* 3. *c.* 7. *ſ.* 104.

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"what prudence may dictate according to the con-"junctures." And the other paſſages cited were directed to the ſame point. The caſe of the *Hoop* (*a*) ſhews that wherever trade is permitted, it is a ſuſpenſion of the ſtate of war quoad hoc; and that of the *Santa Anna* (*b*), that the occupation of any place by the enemy does not neceſſarily make the inhabitants enemies; indeed that doctrine would go the length of denying to a nation the power of controlling its own relations, which is contrary to firſt principles (*c*).

Lord ELLENBOROUGH C. J. The other caſes alluded to in the argument, and which ſtand over for the judgment of the Court, involve other queſtions: here the only queſtion is, whether the plaintiffs have an inſurable intereſt; and that depends upon whether the perſons, in whom the intereſt is averred, are to be conſidered as perſons engaged in a legitimate commerce, and therefore capable of being protected by this inſurance. The ſtate of *Hamburgh* is particularly detailed on the facts ſet forth in this caſe. It ſtates that notwithſtanding the military occupation of *Hamburgh* by an overwhelming *French* force, all the powers of civil government were adminiſtered in the ſame manner as they had formerly been before the arrival of the *French*; and I know of no caſe where a country, maintaining its civil government proprio jure, has been conſidered as conquered. That *Hamburgh* was, at the time when this inſurance was effected, under *French* dominion, and had committed acts to warrant this country to conſider her as hoſtile, there can be little doubt; for the flag of the *Britiſh* govern-

(*a*) 1 *Rob. Adm. Rep.* 199. (*b*) 1 *Edw. Adm Rep.* 180.
(*c*) *Vattel's Introduction, ſ.* 15. & 16.

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ment was at that time excluded, in compliance with the wiſhes, and in furtherance of the policy of the enemy. But aſſuming that the excluſion of the flag of any ſtate amounts to an act which would juſtify hoſtility between the excluding nation and that whoſe flag is excluded, ſtill it belongs to every ſtate to pronounce upon the continuance either of amity, hoſtility, or neutrality as between itſelf and any other ſtate. Neutrality, according to the ſtrict definition of it given by the writers upon public law, rather imports the duty which a neutral owes to a belligerent, than the relative ſituation in which that belligerent chooſes to place her. But as it reſts with every belligerent to determine, according to its views of expediency, in what way it will deal with neutrals who have acted in violation of their duty; neutrality, therefore, in a more enlarged ſenſe, may ſignify that permitted relation between any two ſtates, after the right to its continuance has been forfeited by one of them. Nations may be at war with each other by reciprocal acts of hoſtility done and ſuffered; but they are not bound to take up every cauſe of juſt offence, nor are they of neceſſity to be conſidered as hoſtile to each other, if there be a ſort of condonation on the one ſide, for the purpoſe of continuing commerce with the other who has given juſt cauſe of offence. It will be found alſo, that writers on the law of nations, in treating of neutrality, have been led rather to examine what a belligerent is warranted in doing, than what it is compelled to do. If, for inſtance, notwithſtanding a juſt cauſe of war, a nation ſhould ſtill deem it expedient, conſidering the convulſed ſtate of the commerce of *Europe*, to continue its connection with any other ſtate, it is at liberty ſo to do. Now it appears that this country, finding cer-

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tain other countries overpowered by *French* force, ſtill felt deſirous of maintaining with them its antient relations of peace and amity; and with that view choſe not to enforce againſt them the rigours of war, but to conſider the inhabitants of thoſe countries as perſons with whom commerce might ſtill be carried on. The relation, in which they have been placed at different times, has varied according to circumſtances. But the actual relation of this country with reſpect to *Hamburgh* is to be taken from the laſt order in council, ſubſiſting when this adventure was launched. I have already ſtated that this is not an abſtract queſtion, whether *Hamburgh* might have been deemed at war with this country, but that the queſtion is, how the government of this country has choſen to treat her acts. Keeping theſe obſervations in mind, let us look at the orders of council, with a view of aſcertaining in what relation *Hamburgh* ſtood with reſpect to this country on the 18th of *Auguſt* 1810. The firſt order, bearing date the 18th of *February* 1807, directs "that the ſhips and goods belonging to the inhabitants of *Hamburgh*, which ſhall be employed in a trade to or from the ports of this kingdom, ſhall, until further order, be ſuffered to paſs free and unmoleſted, notwithſtanding the ſaid country is or may be in the poſſeſſion or under the control of *France*, and that all ſuch ſhips and goods which may have been detained, ſhall be forthwith liberated and reſtored." A principle may be collected from this order; for at the very time when the ſhips of *Hamburgh*, antecedently taken as hoſtile, were detained by this country, it recognizes her to ſtand in ſuch a ſituation, as that her ſhips ſhould be reſtored to her. Up to that period, therefore, though ſhe was not ſtrictly neutral, according to the definitions of

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of writers on the law of nations; yet quoad this country, ſhe cannot be conſidered as hoſtile, at a time when it directs that her ſhips ſhall be reſtored. The next order is that of the 26th of *March*, which directs "that all ſhips and goods belonging to the inhabitants of *Hamburgh*, which have been detained prior to the 1ſt of *January* laſt, ſhall be reſtored; and that all ſhips and goods captured on or after the 1ſt of *January*, ſhall be detained (with the exception of ſhips and goods trading to or from this country) until further order," &c. Here the order ſpecifies a time, and from that time has certainly more or leſs of a hoſtile complexion. It cannot be called a promulgation of abſolute hoſtility, but only of a qualified one. Then comes the order of the 17th of *June*, which further directs "that the ſhips and goods of the inhabitants of *Hamburgh*, detained ſince the 1ſt of *January*, ſhall be reſtored; and their ſhips and goods ſhall not in future be liable to detention, provided they ſhall be engaged in a trade to or from this kingdom, or between neutral port and neutral port." Therefore by this it ſeems, that the commerce of *Hamburgh*, to the above extent, is not only not put an end to as hoſtile, but is legitimated; or in other words, within certain limits her character of neutrality is recognized and preſerved. Next follows a general order of the 11th of *November*, and if that order had ſtood, it muſt be admitted, that we ſhould have been placed in an unqualified ſtate of hoſtility with regard to *Hamburgh*. It begins by reciting "that certain unprecedented orders had been iſſued by the government of *France* againſt the *Britiſh* iſlands, and that the nations in alliance with *France*, and under her controul, had given effect to them; and farther, that the order of the 7th of *January* laſt, (the conciliatory order,

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if I may ſo call it,) had not anſwered the deſired purpoſe; it is therefore ordered, that all the ports of *France* and her allies, or of any other country at war with his majeſty, or from which, although not at war, the *Britiſh* flag is excluded, ſhall be ſubject to the ſame reſtrictions, as if blockaded, and that all trade in the produce or manufacture of ſuch countries ſhall be unlawful, and that all veſſels trading to or from thoſe countries, and all goods, &c. ſhall be captured." Here, therefore, the excluſion of the *Britiſh* flag is laid hold of as the criterion of hoſtility, and it is declared that the trading with ſuch places ſhall be unlawful. His majeſty promulgates his will to pronounce thoſe places hoſtile, under the circumſtance of his flag being excluded from them. If then that order had remained unrepealed, there could have been no doubt, that an inhabitant of *Hamburgh* could not have inſured his property. But now comes the repealing order of the 26th of *April* 1809, which again legitimates the trade with all ports and places, not within the line of ſtrictly hoſtile demarcation pointed out by that order; and that, notwithſtanding the *Britiſh* flag is excluded from ſuch ports and places. The order recites, "that his majeſty being deſirous not to ſubject thoſe countries which were (i. e. heretofore were) in alliance or amity with him, to any greater inconvenience than was abſolutely neceſſary, did make certain exceptions in the order of the 11th of *November*, and in ſubſequent orders; and that it was expedient that ſundry parts of them ſhould be revoked; it therefore proceeds to direct, (inter alia,) that the order of the 11th of *November* ſhall be revoked, except as to the trade within certain limits." Let us ſee then whether *Hamburgh* is within the exception, ſo that the prohibition of her trade is kept alive by this order,

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the ſame as if ſhe was actually blockaded. The exception extends to all ports and places as far North as the river *Ems* incluſively; ſo that its limits are expreſsly defined; and the operation of the order as to time is made equally certain, and not left to any implication, for it is to have effect from the day of the date, on any voyage which is rendered legal by this order, although ſuch voyage at its commencement was unlawful and prohibited by the former orders. Now *Hamburgh* is not within the *Ems*, which is the outward boundary, and therefore not within the exception; and this was a trade which was before unlawful, and therefore now made lawful by the operation of this order. The drawing a boundary line excludes any inference which might otherwiſe ariſe from its being in the poſſeſſion of a *French* force. There is another order of the 17th *May* 1809, for the more diſtinctly aſcertaining the places within the limits excepted in the laſt order, and that extends the blockade to the Eaſtern as well as Weſtern *Ems*. It ſeems to me therefore that under theſe circumſtances we are to look at what the government of this country has choſen to conſider as neutral; and that it muſt be taken that it choſe to conſider as ſuch, thoſe countries with whom it has permitted trade. If the order of the 11th of *November* 1807 had ſtood, *Hamburgh* could no longer have been conſidered as in a ſtate of amity, owing to the effect given in that order to the excluſion of the *Britiſh* flag. I am not here pronouncing that the excluſion of the flag of a country amounts on all occaſions to an act of hoſtility. The mere excluſion of trade does not neceſſarily import an indication of a hoſtile intention, ſtill leſs does it hoſtility itſelf. We know that there exiſts in ſome countries a great jealouſy

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of admitting ſtrangers into their ports. *China* affords an inſtance of this kind, and yet ſhe is not deemed an enemy on that account. Here this country has, by the effect of theſe orders, placed *Hamburgh* in different relations at different periods. In *November* 1807 we find her treated as hoſtile; afterwards it was thought expedient to alter her relative ſituation, and to recognize her inhabitants, as perſons with whom trade might be carried on; and their ſhips and goods were releaſed from confiſcation and condemnation. From this review of the ſeveral orders in council, ſeeing nothing to render the inhabitants of *Hamburgh* hoſtile, or perſons with whom trade might not lawfully be carried on, it is unneceſſary to look to the licence, for under theſe circumſtances no licence was neceſſary. This caſe preſents this point, and this alone, whether the perſons in whom the intereſt is averred can be protected by this policy, which depends on this, whether the trade was legal. I think for the reaſons already given, that they may be protected. We thought it better to diſpoſe of this queſtion by itſelf, in order to lay a foundation for deciding other caſes, and to relieve ourſelves from a complication of queſtions. Upon the whole I am of opinion that the plaintiff is entitled to recover on the intereſt averred, it not being an intereſt in any manner hoſtile.

GROSE J. The ground of objection is, that the parties in whom the intereſt is averred are in truth enemies. That introduces the queſtion, whether *Hamburgh* ſtood in a hoſtile relation to this country. Now looking to the orders in council, and conſidering them in the light in which they have been put by my Lord, the

caſe ſeems plain. It is impoſſible not to ſee by them, that the trade was in ſome meaſure made legitimate by this country. This is not a queſtion whether this government might not juſtly have gone to war with *Hamburgh*, but whether it was at war. I cannot ſay, from a conſideration of theſe orders, that ſuch was her ſtate. The orders breath ſomething pacific, and permit a commerce between *Hamburgh* and this country. If that is the caſe, and the expoſition given of them by my Lord be correct, there is an end of the queſtion. It is impoſſible to ſay that the government of this country may not conſider the inhabitants of another country as neutral with reſpect to her commerce. The queſtion is whether this country did ſo conſider the inhabitants of *Hamburgh*. It ſeems to me that the conſtruction given to the orders is the correct one, and if ſo the queſtion is concluded, becauſe the foundation of the argument, namely, that this contract was entered into with a ſubject of a ſtate at war with this country, altogether fails.

LE BLANC J. In this action, certain merchants reſident in this country ſeek to recover an indemnity, on behalf of other merchants domiciled at *Hamburgh*; and the queſtion is whether the contract is valid, in reſpect of the particular ſituation in which the *Hamburgh* merchants ſtood. The queſtion comes to this, whether thoſe merchants ſtand in the ſituation of perſons, whom the policy of the law of this country prevents from entering into a contract of indemnity, or from having ſuch a contract entered into on their behalf. The principle, upon which the policy of the law interferes, is this, that all trading with an enemy tends to ſtrengthen and aſſiſt the enemy,

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enemy, and is therefore calculated to defeat the object for which war is entered into; and consequently no contract to protect the property of the enemy can be permitted. That brings it to the question, whether *Hamburgh* stood in such a situation, as that the law of this country would not permit a contract to be entered into, for the benefit of one of the subjects of that state. The insurance was effected in *August* 1810, and the voyage commenced in *September*. It is material to consider whether such was the state of *Hamburgh* at that time. It is a very different question, whether the relation between two countries is such as to authorize a state of warfare between them; if that were the question, the authorities cited for the Defendant would be most powerful; but the question is not that, but whether this country considered the relation of *Hamburgh* to be such, as to make it prejudicial to allow of any contracts for the purpose of indemnifying the inhabitants of that state. Now that question brings us to the orders. They have already been so fully commented on by my Lord, that I shall abstain from going through them. It cannot but be observed however that the order of the 11th of *November*, which is of the most hostile complexion, was much abridged in its operation by the subsequent orders existing prior to this contract; and therefore whether that order was intended to place *Hamburgh* in a state of hostility, or not, the subsequent orders have done away its effect, and placed the inhabitants upon the footing of persons, whose property the policy of this country allows to be protected. This is entirely independent of any question upon the licence. If I thought it necessary to advert to that, I should construe the language of the licence, in conformity with the orders in council, and according to the relation in which the

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the inhabitants of *Hamburgh* ſtood under thoſe orders; and I ſhould hold the expreſſion "on the behalf of neutral merchants" to apply to thoſe perſons, whom this government did not conſider as in a ſtate of hoſtility; and therefore the reſult would be the ſame. Therefore on every view of the ſubject I conſider the Plaintiff as entitled to recover.

BAYLEY J. I am entirely of the ſame opinion. There certainly was conduct on the part of *Hamburgh*, which might have warranted this country in treating her as an enemy; but ſtill this country was not obliged to do ſo. An overruling power poſſeſſed themſelves of *Hamburgh* againſt the inclination and intereſt of its inhabitants; but did not diſpoſſeſs them of their civil rights, nor of the right of carrying on trade with this country. Nothing will be found in the exiſting orders of council, declaratory of the intention of the *Britiſh* government to place *Hamburgh* in a hoſtile ſtate; on the contrary thoſe orders provide that ſhips and goods belonging to *Hamburgh*, and engaged in trade to or from this kingdom, or between any neutral ports, ſhall not be liable to detention. Therefore however equivocal her relation might be in ſome points of view, it is clear that in this reſpect ſhe was conſidered by this country as friendly. Whether the order of the 11th of *November* changed the condition of her relations to this country, it is unneceſſary to conſider; becauſe that order is revoked by a ſubſequent order.

Judgment for the Plaintiff.

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Friday, May 21ſt.

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The charterer of a ſhip from *L.* to *B.* and back, cannot plead to an action brought againſt him by the owner on the charter-party for not providing a ſufficient cargo at *B.*, that the ſhip ſailed on the voyage from *L.* without convoy, contrary to the 43 *G.* 3. *c.* 57., and that the plaintiff was privy to and knew the ſame: it not being in the contemplation of the parties at the time of entering into the contract to violate the regulations of that act.

COVENANT on a charter-party of affreightment, by the plaintiff as owner of the brig *Diana*, on a voyage from *Liverpool* to *Madeira*, from thence to *Barbadoes*, and from thence to *Dublin* or *Hull*, or back to *Liverpool*; breach, that the defendant did not, nor did the agents of the defendant provide a full and complete cargo of *Weſt-India* produce at *Barbadoes*, but refuſed ſo to do; and the cargo ſhipped at *Barbadoes* by the defendant's agents was deficient of ſuch full and complete cargo by 206 tons, &c. There were ſeveral pleas to the declaration, upon which iſſue was taken. The 4th plea ſtated that the veſſel, before and at the time of ſetting ſail on her voyage from *Liverpool* to *Barbadoes*, and continually from thence until the commencement of the ſuit, belonged to the plaintiff; and that the plaintiff during all that time was and ſtill is one of his majeſty's ſubjects of this realm; and that the veſſel ſailed on her voyage from *Liverpool* to *Barbadoes* without convoy, &c. contrary to the form of the ſtatute; and that the plaintiff was privy to and knew the ſame. The plea then negatived the veſſel's being within any of the exceptions contained in the act, which diſpenſe with the neceſſity of ſailing with convoy; and concluded, whereby and by force of the ſtatute the ſaid voyage became and was illegal and void, and the plaintiff was not nor is entitled to any freight whatſoever for the ſaid voyage in the charter-party mentioned, or for any part thereof.

Replication, that the veſſel had a licence to ſail and depart without convoy from *Liverpool*, granted by three of the

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the commiſſioners for executing the office of high admiral, or by ſome perſon or perſons duly authorized for that purpoſe.

Demurrer, aſſigning for cauſes, that the ſuppoſed licence in the replication mentioned, and the particulars thereof, are not ſet forth in that plea; and that it doth not appear by the ſame, whether or not there were any conditions in the ſuppoſed licence, nor what thoſe conditions, if any, were, or whether or not ſuch conditions, if any, have been kept and performed; and that it doth not appear by the ſame plea, by what perſon or perſons duly authorized for that purpoſe the ſuppoſed licence was granted, nor by and under what authority ſuch perſon or perſons ſo granted the ſame: and alſo for that the ſame is in other reſpects informal, &c. Joinder in demurrer. There was alſo another plea ſtating, as in the former, that the veſſel belonged to the plaintiff, and that he was one of his majeſty's ſubjects; it then alleged that a certain licence, before the veſſel ſet ſail on her voyage from *Liverpool*, to wit, on the 30th of *April* 1811, was granted for the veſſel to ſail or depart from the port of *Liverpool* without convoy, on her voyage to *Madeira* and *Barbadoes*, by *J. B.*, *J. S. Y.*, and *F. R.*, then and there being three of the commiſſioners for executing the office of Lord High Admiral of *Great Britain*, provided ſhe ſhould be armed and manned in a ſpecified manner; and that at the time the ſaid veſſel ſailed from *Liverpool*, no other licence was or had been granted for the ſaid veſſel to ſail or depart therefrom without convoy, either by the Lord High Admiral of *Great Britain*, or the commiſſioners for executing the office of Lord High Admiral for the time being, or any three of them, or by any perſon or perſons duly authorized for that purpoſe; and that the ſaid veſſel ſailed

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on the voyage from *Liverpool* to *Barbadoes* without convoy, &c. contrary to the form of the ſtatute, and that the plaintiff was privy to and knew it; and that the veſſel at the time of her ſailing was not manned in the ſpecified manner, but ſailed without convoy manned with a leſs number than ſpecified, contrary to the form and effect of the licence, and that the plaintiff knew the ſame. The plea then negatived the exceptions contained in the act, and concluded in the ſame manner as the former.

To this plea there was a general demurrer. Joinder in demurrer.

Scarlett, for the plaintiff, began by adverting to the convoy act (*a*), and was about to contend that the act which impoſed a penalty on the maſter for ſailing without convoy, did not make it a condition precedent to his acquiring any rights under the charter-party; when the Court interpoſed, and called on

Holroyd, for the defendant, who inſiſted that in this form of action, which was not like an action for the freight, grounded upon an adoption by the defendant of the charter-party, it was open to the defendant to avail himſelf of the objection ariſing from the ſailing without convoy, contrary to the proviſions of the ſtatute; and for breach of which the ſtatute made the voyage illegal. The firſt ſection enacts, that it ſhall not be lawful for any ſhip, &c. to ſail from any port or place whatever, unleſs under convoy; which is an expreſs declaration of the illegality of the voyage, independent of any penalty; and this is confirmed by *ſ.* 4., which makes inſurances upon all ſhips ſailing without convoy, contrary

(*a*) 43 *G.* 3. *c.* 57.

to

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to the act, void to all intents and purposes. And for that cause, in *Hinckley* v. *Walton* (*a*), the Court of Common Pleas held the voyage illegal; and yet the policy in that case, as the charter-party in this, was made while it was in doubt whether the ship would sail with or without convoy.

Scarlett, in reply, distinguished *Hinckley* v. *Walton* from this case, inasmuch as that was the case of an insurance; and besides it was to be inferred from the report, though not expressly so stated, that the assured had previously determined to sail without convoy.

Lord ELLENBOROUGH C. J. If this contract had been made upon an understanding that it was intended to contravene the provisions of the act of parliament, perhaps the voyage might have been illegal, as being an act contemplated to be done in violation of a law of the state; but this contract was entered into, as we must presume until the contrary be shewn, in perfect innocence, and with the purpose of effectually complying with the act of parliament. It may be asked, then, when does the illegality attach? Can it be said that by matter ex post facto it became void ab origine? I consider the case in *Taunton* as decided with reference to an insurance, which is expressly made void by the statute, and is not this case. The question here is, whether a contract by charter-party, there being nothing to shew a previous intention of departing from the directions of the convoy act, is to be vitiated by relation to an act subsequent. I know of no rule of construction of that sort. If it is to be ar-

(*a*) 3 *Taunt*. 131.

gued,

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gued, that becauſe the captain did not comply with the regulations of the act in one inſtance, therefore he would not fulfil the terms of the charter-party, it would lead to this inconvenience, that in every caſe we ſhould have to eſtimate the moral rectitude of the captain. Here the queſtion is, whether the contract is made void by the departure of the captain, without convoy, which ſubjected him to a penalty. I cannot draw any inference from this breach of the ſtatute, that the contract was meant to be avoided.

BAYLEY J. In *Hinckley* v. *Walton* there is no doubt that the aſſured was inſtrumental, within the words of the act, to the ſhip's ſailing as it did. And in a former caſe of *Cohen* v. *Hinckley* (*a*), it was conſidered that the policy was not avoided by the ſhip's ſailing without convoy, unleſs the party intereſted was inſtrumental to her ſo ſailing. I therefore think in this caſe that the defendant was not excuſed from completing his loading, becauſe the captain neglected to comply with the proviſions of the act.

Per Curiam, Judgment for the Plaintiff.

(*a*) 1 *Taunt.* 249.

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Saturday, May 22d.

Where a pauper, as freeman of a town, was entitled, during his reſidence there, together with the other freemen, to a ſtinted common of paſture on a neighbouring moor for his own cattle, and alſo to a right to cut peat for his own uſe, and get limeſtones, &c. on the moor, and to put his children to the town ſchool free of expence, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exerciſed the common of paſture, or had any cattle with which to exerciſe it: held that theſe rights did not amount to ſuch an eſtate as to make him irremoveable.

UPON an appeal againſt an order of two juſtices, removing *William Forſter*, his wife and children, from the pariſh of *Alnwick* to the townſhip of *Warkworth*, both in the county of *Northumberland*; the ſeſſions confirmed the order, ſubject to the opinion of the Court on the following caſe:

The pauper *W. Forſter* was ſettled in *Warkworth*, but reſided for ſome years in the town of *Alnwick* before he became chargeable, and was removed by the preſent order; at which time he was a freeman of the town. The town of *Alnwick* is an ancient borough, and the freemen of *Alnwick* are a body corporate by preſcription by the name of the chamberlains, common council, and freemen of *Alnwick*. The freedom of the town is acquired by deſcent or ſervitude, or is granted upon the recommendation of the common council. The pauper was a freeman by deſcent, and had been admitted to his freedom twenty-five years before the order of removal. The Duke of *Northumberland* is lord of the manor and borough of *Alnwick*; and the foreſt of *Haydon*, or *Alnwick*, or *Alnwick* moor, lies within the manor, the ſoil and royalties being veſted in the lord. The paſturage of the moor is of conſiderable value, and the freemen of *Alnwick* and no others, are entitled to common of paſture thereon, each freeman being entitled, when reſident, but not otherwiſe, to the paſturage of five ſtints of his own cattle, that is to ſay, five cows, or twenty-five ſheep: the freemen have alſo a right to dig and cut peats, furzes, turves, and

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buſhes upon *Alnwick* moor for their own uſe, and to get limeſtone, ſlates, and freeſtones in the open quarries of that moor: they have the privilege alſo of ſetting up their ſtalls in the market-place, without paying any toll or ſtallage to the lord, and of having their children educated free of expence at the town ſchool, at which ſchool two of the children named in the order were placed at the time of the removal.

The queſtion for the conſideration of the Court is, whether the rights of the pauper, as a freeman of the borough of *Alnwick* amount to an eſtate from which he is not legally removeable under the ſtatute 13 & 14 *Car.* 2. *c.* 12.

Topping and *Hullock*, in ſupport of the order of ſeſſions, contended in the negative. They admitted that a right of common being a privilege ariſing out of land, had been ſo far conſidered as land, as to be holden a tenement; but ſuppoſing this privilege amounted to a right of common, they inſiſted that in order to make the pauper irremoveable from it, it muſt appear that he was in the actual poſſeſſion and enjoyment of this right. Now here the pauper had a mere title to exerciſe a privilege, which it does not appear he ever did exerciſe, or was even in a capacity to exerciſe, for it is not ſtated that he had any cattle; and every freeman will be irremoveable if this pauper be ſo, for though he has no cattle now, non conſtat but he may have at a future time. Even in caſes which clearly come within the meaning of the party's own freehold, it was for a long time doubted whether, in order to be irremoveable, he muſt not be reſident on the property: and although that has been decided not to be neceſſary in *Rex* v. *Houghton Le Spring*

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Spring (*a*), and other caſes; ſtill there muſt be a legal if not an actual occupation. But independently of that objection, it is ſubmitted that ſuch a perſonal privilege as this has never been held to make the party entitled to it irremoveable: it is a mere perſonal privilege, continuing only ſo long as the party is reſident, and not transferable, or capable of being demiſed; ſo that it does not even amount to a common in groſs.

Richardſon and *Coltman* contrà. It is laid down by *Foſter* J., that by magna charta a perſon is not removeable from his freehold (*b*); and the reaſon given is, "becauſe none ſhall be diſſeiſed of his freehold." Now the ſame reaſon which applies to land, applies alſo to every ſpecies of tenement of a freehold nature. The preſent franchiſe is of that ſort, for it amounts to a profit a prendre, or a right of common in groſs, which has been held ſufficient to confer a ſettlement (*c*); and the pauper, although not in the actual enjoyment, might at any time have become capable of enjoying it. It is true that he had not any cattle; but he might have had; and it would lead to uncertainty, if it were to be holden neceſſary that he ſhould be in the actual occupation at the time of removal. Suppoſe this pauper had had cattle at one time, and had been in the exerciſe of his right of common, but had diſpoſed of thoſe cattle with an intention of buying others of a more uſeful deſcription, would he be removeable during the interval? But at all events, taking this to be a ſimple franchiſe, it may be ſaid to be as much his own, as any other man's eſtate

(*a*) 1 *Eaſt*, 247. (*b*) *R.* v. *Aythrop Rooding*, *Burr. S.C.* 414.
(*c*) 7 *T.R.* 671. *Rex* v. *Derſingham*. 3 *Eaſt*, 113. *Rex* v. *Hollington*.

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is his own: he is entitled to it proprio jure, and it appears that he was in part in the exerciſe of it, by educating his children at the public ſchool; beſides which, there was a right of getting ſlates, which is clearly a right to a portion of the ſoil.

GROSE J. (*a*) There is no doubt whatever in this caſe. When I read it, I was ſomewhat ſurprized that the juſtices ſhould have thought fit to reſerve it. The queſtion is whether the pauper, *W. Forſter*, was irremoveable from his own eſtate. In order to determine that, we muſt inquire what eſtate he had. Now it appears that he had neither land nor houſe: it is ſaid, however, that he had a right of common; but ſuppoſing he had, it does not appear that he was ever in the enjoyment of, or had any cattle wherewith to exerciſe that right. The profit a prendre, or eaſement, as it has been called, never exiſted in him; how then can he be ſaid to have been reſident on his own? It cannot be conſidered as a reſidence on his own, when in truth he never had it. It would be abſurd ſo to conſider it.

LE BLANC J. The queſtion is, whether it appears to us that the pauper was irremoveable, during the period of his reſidence in the town of *Alnwick*, on the ground of being reſident on his own eſtate. The caſe made in argument to ſhew that he was reſiding on his own is this, that he was a freeman of the town, and as ſuch entitled to a right of common on *Alnwick* moor: and this right of common is ſaid to be a tenement. But I think this is not in ſtrictneſs a right of common, nor

(*a*) Lord *Ellenborough* C. J. was abſent.

can

can it properly be ſaid to be a tenement; it is a mere franchiſe. The argument, however, has been carried this length, viz. that ſuppoſing it to be only a franchiſe, ſtill the pauper was irremoveable from it. But to this I cannot accede. In the caſe, for inſtance, of a freeman of a corporation, who has a right of ſuffrage for the election of a mayor, or any other of the officers belonging to the corporate body, has it ever been decided that ſuch a franchiſe made the perſon entitled to it irremoveable? Here the pauper, as a freeman of the town, was entitled, if he had any cattle, to turn them on the moor. This, however, was a mere perſonal privilege, wholly unalienable, and not falling within the legal definition of a right of common. A privilege of this ſort, I believe, has never yet been holden to be ſuch an eſtate as to make the perſon entitled to it irremoveable. It is a ſtrong circumſtance, that notwithſtanding the exiſtence of ſuch rights in different parts of the kingdom, no attempt like the preſent has hitherto been made. It appears to me, therefore, that this does not fall within the purview of thoſe caſes which have decided that a party is not removeable from his own; and which doctrine, I admit, has been extended to caſes where a party was merely reſiding in the pariſh in which his eſtate was ſituate, and not upon the eſtate itſelf. (*a*)

BAYLEY J. The caſe does not find that the pauper had any houſe in which he was entitled to reſide; and as a freeman he had no right of reſidence; but that muſt be acquired by other means. When he can ob-

(*a*) *Rex* v. *Sowton*, *Burr. S.C.* 125. *Rex* v. *St. Nyott's*, *ibid.* 132. *Rex* v. *Houghton Le Spring*, 1 *Eaſt* 247. *Rex* v. *Darſtone*, *ibid.* 296.

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tain a reſidence, then as freeman he is entitled during ſuch reſidence to turn cattle on the common. But when he removes, he loſes this privilege. I am not aware of any caſe, in which a privilege of this deſcription has been holden to be ſufficient to confer a ſettlement. It is a mere local privilege, and attached to the perſon ſo long only as he is reſident. From the frequency of theſe rights, which exiſt in many corporations in the kingdom, ſettlements muſt have been claimed in reſpect of them, had they been deemed ſufficient for that purpoſe. This caſe is very different from the caſes of removals from landed property.

Order of ſeſſions confirmed.

Saturday, May 22d.

LANCASTER *againſt* FRASER.

Judgment of non pros for not entering the iſſue, cannot be ſigned unleſs there be a rule to enter the iſſue of the ſame term in which ſuch judgment is ſigned.

READER ſhewed cauſe againſt a rule for ſetting aſide a judgment of non pros. The rule to enter the iſſue was in *Michaelmas* term; iſſue not entered in time, and thereupon judgment of non pros; which was afterwards ſet aſide on payment of coſts. In *Hilary* term nothing was done. In this term, the iſſue not having been entered, judgment of non pros was ſigned. The queſtion was whether there muſt not be a rule to enter the iſſue of the term in which judgment was ſigned. It was admitted that with reſpect to a rule to plead the practice was ſo (*a*); and the Court, upon reference to the maſter, ſaid it was the ſame in this caſe.

Comyn in ſupport of the rule.

Rule abſolute.

(*a*) *Tidd's Prac.* 369., laſt edit.

The KING *againſt* The Juſtices of SURREY.

Monday, May 24th.

THIS was a rule for a mandamus to the juſtices of *Surrey*, commanding them to receive an appeal againſt an order of two juſtices, removing *George Kellaway* and his family from *Richmond* to *Mortlake*.

The rule was obtained on the affidavit of one of the pariſh officers of *Mortlake*, which ſtated that the order of removal was dated on the 11th of *January* laſt, and was executed in the afternoon of that day. That the quarter ſeſſions for the county of *Surrey* began on the 12th, and that there was not ſufficient time to procure any information reſpecting *Kellaway*'s ſettlement, or the requiſite evidence to ſupport an appeal, or even to aſcertain whether ſuch appeal ought to be made. That according to the practice of the ſeſſions for that county, notice muſt be ſerved on the reſpondent pariſh by the appellant, of their intention to try ſuch appeal, at leaſt ſix clear days before the commencement of the ſeſſions; that due notice having been given for the *Eaſter* ſeſſions, the appeal was then entered; but the Court refuſed to hear the appeal, on the ground that it ought to have been entered at the *Epiphany* ſeſſions, and reſpited until the next ſeſſions.

Againſt the rule an affidavit was made by *C. J. Lawſon* Eſq., clerk of the peace, which ſtated that by the courſe and practice of the quarter ſeſſions for that county, they are always adjourned for a certain time, and appeals againſt orders of removal are allowed to be lodged at any time during the ſitting of the ſeſſions,

Where an order of removal was made and executed on the day before the the holding of the *Epiphany* ſeſſions, and the pariſh to which the pauper was removed, gave due notice and entered their appeal at the *Eaſter* ſeſſions, at which ſeſſions the juſtices refuſed to hear the appeal, on the ground that it ſhould have been entered at the *Epiphany* ſeſſions; this Court granted a mandamus to the juſtices to receive ſuch appeal, notwithſtanding it appeared that the *Epiphany* ſeſſions continued for fourteen days, and were afterwards twice adjourned to diſtant days, and that it was the practice of the ſeſſions to allow appeals to be entered at any time during their continuance, or at the adjournments, and to reſpite the hearing to the next ſeſſions.

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or at the adjournment held next after the making ſuch order, without requiring notice to be given to the reſpondents. And that the conſideration of ſuch appeal is thereupon adjourned to the next quarter ſeſſions after thoſe at which it is ſo lodged. That the laſt *Epiphany* quarter ſeſſions commenced on the 12th of *January*, and laſted fourteen days, when they were adjourned to the 2d of *February* following, (which adjournment laſted one day,) and again adjourned to the 1ſt of *March*, which laſted two days. It was ſtated alſo that *Newington*, where the *Epiphany* ſeſſions were holden, was diſtant only eight miles from *Mortlake*.

Park and *Lawes* upon ſhewing cauſe, admitted that according to the conſtruction of the ſtat. 13 & 14 *Car.* 2. *c.* 12. *ſ.* 2., which gives the appeal, the next quarter ſeſſions muſt be taken to mean the next poſſible ſeſſions (*a*); but they contended that the *Epiphany* ſeſſions were the next poſſible ſeſſions, for it appears that by the practice of the ſeſſions the appeal might have been lodged at any time during their continuance, which was fourteen days, or afterwards, at either of the adjournments; and no notice is neceſſary before entering the appeal, although by the 9 *G.* 1. *c.* 7. *ſ.* 8., notice muſt be given before the hearing. And this being a pariſh within the county, muſt be preſumed cognizant of the practice; and being alſo in the vicinity of where the ſeſſions were holden, it falls within the rule in *Rex* v. *The Juſtices of Herefordſhire* (*b*), where, although the pariſh was more diſtant from the ſeſſions than in this caſe, and the prac-

(*a*) *R.* v. *Juſtices of Yorkſhire*, *Dougl.* 192., 4th edit.
(*b*) 3 *T. R.*, 504.

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tice was not to receive appeals after the firſt day, this Court refuſed a ſimilar application to the preſent.

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Nolan, in ſupport of the rule, relied on *Rex* v. *The Juſtices of London*. (*a*)

Lord ELLENBOROUGH C. J. The ſtatute does not contemplate the continuance of the ſeſſions. It enacts that the party may appeal "to the next quarter ſeſſions," without adding "or ſome adjournment thereof." It takes the holding of the ſeſſions as the point of time, to which it refers the appeal; and the ſeſſions are always conſidered in law as one day, to whatever period they may by accidental cauſes be extended. The appellant pariſh ought to have a reaſonable time allowed for conſidering whether they will appeal or not. The queſtion is, whether the interval between the 11th and 12th of *January* was a reaſonable time for that purpoſe. We are of opinion that it was not.

BAYLEY J. referred to *Rex* v. *Juſtices of Flintſhire*. (*b*)

Per Curiam, Rule abſolute. (*c*)

(*a*) 15 *Eaſt*, 632. (*b*) 7 *T. R.*, 200.

(*c*) See *R.* v. *Juſtices of Dorſet*, 15 *Eaſt*, 200., and *R.* v. *Juſtices of Suſſex*, *ib.* 206.

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Monday, May 24th.

LEE *againſt* BIRRELL.

The 23 *G.* 3. *c.* 90. *ſ.* 4., for paving and lighting the pariſh of *St. Martin*, which prohibits under a penalty any perſon during the time *he ſhall be collector of any tax*, or hold any office of profit, or be intereſted in any contract or work to be done in the execution of that act, from acting as a committee-man under the act, does not extend to a collector of the aſſeſſed taxes.

DEBT for penalties. The declaration ſtated that the Defendant, after the making of a certain act of parliament, paſſed in the 23d year of his preſent majeſty, intituled, "An act for better paving, cleanſing, and lighting the pariſh of *St. Martin in the Fields*," &c. (*a*), on the 29th of *September* 1812, at the pariſh of *St. Martin*, in the county of *Middleſex*, did act as a committee-man in the execution of the ſaid act, he, the Defendant, then and there being *collector of a certain tax commonly called the aſſeſſed taxes for a certain part of the ſaid pariſh*, that is to ſay, *Suffolk-Street* ward, contrary to the form of the ſaid act. Whereby and by force of the ſaid act the defendant then and there forfeited 100*l.*, &c. The ſecond count was for a like penalty, charging that the Defendant did act as a committee-man, &c. he the Defendant then and there *being collector of a certain tax called the property-tax for the ſaid part of the pariſh*, contrary to the ſaid act. There were other counts. Plea, nil debet.

At the trial before Lord *Ellenborough* C. J., at the *Middleſex* ſittings after laſt term, it was proved that the

(*a*) By 23 *G.* 3. *c.* 90. *ſ.* 4. it is enacted, that no perſon ſhall be capable of acting as a committee-man in the execution of the ſaid act, unleſs he ſhall be then reſident, &c., nor during ſuch time as he ſhall be collector of any tax, or ſhall hold any office of profit, or be any way intereſted or concerned in any contract or work to be done in and about the execution of any of the powers of the ſaid act. And in caſe any ſuch perſon hereby made incapable of acting as a committee-man in the execution of this act, ſhall nevertheleſs preſume to act as ſuch, every ſuch perſon ſhall for every ſuch offence forfeit and pay the ſum of 100*l.*, &c.

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defendant acted as a committee-man in the execution of the said act, and was at that time a collector of the assessed taxes for *Suffolk-street* ward, as alleged in the declaration, whereupon his Lordship allowed the plaintiff to take a verdict on the first count, with leave to the defendant to move to enter a nonsuit.

Richardson accordingly on a former day in this term obtained a rule nisi for entering a nonsuit, or arresting the judgment, on the ground that the prohibition contained in stat. 23 *G.* 3. *c.* 90. *s.* 4. must be restrained to persons that should be collectors of any tax, or should hold any office of profit, &c. connected with the said act, and did not extend to collectors of the public revenue.

Abbott (with *Holroyd*) shewed cause, and relied on the generality of the words "collector of any tax," which might have been controlled, if so intended, by words restrictive of their meaning to that act; in the same manner as in a subsequent part of the clause the prohibition was expressly confined "to persons interested in any contract or work to be done in and about the execution of the act."

But the Court were clearly of opinion that the latter words over-rode the whole clause; and controlled the general meaning of the words "collector of any tax," or who "shall hold any office of profit;" otherwise a different construction would go to disqualify a person who held an office, however exalted, in fee or in tail, from executing the powers of this act; which would be pushing the construction beyond all reasonable limits.

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Then if the words cannot reaſonably be underſtood in their generality, as including every office of whatever nature, they muſt be conſtrued as of an office connected with this act.

Rule abſolute.

Tueſday, May 25th.

SHIPLEY and Others *againſt* KYMER and Others.

Where ſugars were ſhipped from abroad under a bill of lading, which expreſſed that they were on account of the plaintiffs, and were to be delivered to *W.* and their aſſigns, and *W.* who were the agents of the plaintiffs for the management of their property conſigned from abroad, indorſed the bill of lading, together with the other bills of lading compriſing the reſt of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted and paid, and ſold the ſugars at two months credit, at the expiration of which they carried the amount of the proceeds to the account of *W.*, who in the interval between the ſale and the expiration of the credit had become bankrupts: Held that the plaintiffs were entitled to recover the proceeds of ſuch ſale from the defendants.

ASSUMPSIT for money had and received. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Michaelmas* term a verdict was found for the plaintiffs, ſubject to the opinion of this Court upon the following caſe:

The plaintiffs are proprietors of eſtates in the iſland of *Nevis* in the *Weſt Indies:* the defendants are brokers in partnerſhip reſident in *London*. Meſſrs. *Williams* and *Wilſon*, who were merchants at *Liverpool*, were employed by the plaintiffs as their agents in *England*, for the management of the property conſigned from their eſtates in *Nevis;* and were in the habit of employing the defendants as brokers, for the ſale of cargoes of goods coming to the port of *London*, conſigned to them (*Williams* and *Wilſon*), and of drawing bills upon the defendants on account of ſuch cargoes; and there was an open account between them. In *July* 1810 ſeventy hogſheads of ſugar marked F. S. the property of the plaintiffs, were ſhipped at the iſland of *Nevis* on board the ſhip *Auguſta*, under a bill of lading, ſpecifying that the ſeventy hogſheads were on account and riſque of the heirs of Lady *F. Stapleton*

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deceaſed, and were to be delivered to Meſſrs. *Williams* and *Wilſon* or to their aſſigns. The bill of lading was in the common printed form, and the words "on account and riſque of the heirs of Lady *F. Stapleton* deceaſed," were inſerted in writing. The plaintiffs are the perſons deſcribed as "the heirs of Lady *F. Stapleton* deceaſed." In the beginning of *September* 1810, *Williams* and *Wilſon*, who were conſignees alſo of the whole cargo of the *Auguſta*, indorſed and delivered to the defendants the above-mentioned bill of lading, which they had received from the plaintiffs, together with all the other bills of lading of that ſhip; and at the ſame time drew bills upon the defendants againſt the cargo, including the ſugars mentioned in the bill of lading, to the amount of 15,000*l.*, at four months; which were accepted and paid by the defendants. Upon the arrival of the ſhip, the defendants on the 4th of *September* entered the cargo at the cuſtom-houſe, and proceeded to land and ſell it, according to the uſual courſe of buſineſs between them and *Williams* and *Wilſon*. The ſugars were ſold at the uſual credit of two months in various parcels, between the 25th of *September* and the 9th of *October*, both incluſive, and were paid for in due courſe. *Williams* and *Wilſon* ſtopped payment on the 17th of *September*, and never again reſumed their payments; and their ſtoppage was known to the defendants ſhortly after it took place, and before they had ſold any part of the ſugars; but long after they, as brokers to *Williams* and *Wilſon* for the ſale of the ſaid ſugars, had accepted bills to the amount above mentioned. On the 17th of *November*, *Williams* and *Wilſon* committed an act of bankruptcy, and on the 30th a joint commiſſion was iſſued againſt them and one *Harriſon*, and on the 14th of *December* another commiſſion againſt them only.

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The firſt commiſſion was afterwards ſuperſeded by order of the Lord Chancellor, but the ſecond is ſtill in proſecution. The defendants on the 10th of *December* carried to the credit of *Williams* and *Wilſon*'s account in their books the ſum of 2066*l.* 15*s.* 1*d.* as the amount of the ſales of the 70 hogſheads of ſugars, the two months credit on the ſeveral parcels having expired at that time, and the whole amount being then due. On the 19th of *December* the accounts were tendered, bearing date on that day. *Williams* and *Wilſon* are indebted both to the plaintiffs and to the defendants to a greater amount than the ſum ſought to be recovered in this action. In *May* 1811 a demand was made by the agents of the plaintiffs upon the defendants for the proceeds of the 70 hogſheads of ſugar in queſtion. The queſtion for the opinion of the Court is, whether the plaintiffs are entitled to recover. If the Court ſhould be of that opinion, the amount of the damages to be aſcertained by a reference; otherwiſe a nonſuit to be entered.

Boſanquet for the plaintiffs obſerved on the facts, that as the bill of lading expreſsly ſpecified that the ſugars were conſigned to *Williams* and *Wilſon* on account of the plaintiffs, there could be no doubt that the defendants when they took the bill of lading and made advances upon the ſugars, did it with full notice that *Williams* and *Wilſon* were only factors. They afterwards ſold the ſugars with a knowledge of *Williams* and *Wilſon*'s inſolvency, and received payment for them after their bankruptcy; and the queſtion is, whether under theſe circumſtances they are entitled to withhold the proceeds of ſuch ſale, which the plaintiffs, adopting the act of ſale, ſeek to recover from them in this form of action. The defend-

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ants can only be entitled to withhold the proceeds either as having a lien on them for their advances to *Williams* and *Wilſon*, or as having a ſet-off againſt them, or as being diſcharged by payment. As to the firſt, if they had not a lien on the goods, neither can they have on the proceeds; for the one is conſequent upon the other; and in *Martini* v. *Coles* (*a*) it was decided that a factor by pledging the goods of his principal cannot convey a lien to the pawnee for his advances. Then as to the ſet-off, that can only exiſt in caſes of mutual credit or debts (*b*); whereas this ſale by the defendants did not conſtitute any debt between themſelves and *Williams* and *Wilſon*; being made with full notice, which the bill of lading conveyed to them, that *Williams* and *Wilſon* were only factors. The ſale therefore properly conſtitutes a debt between them and the plaintiffs, who were the principals. In *Maanſs* v. *Henderſon* (*c*) it was held that where an agent at the time when he effected an inſurance told the broker that the ſhip was neutral, it was a ſufficient indication that he was acting as agent, and not on his own account, although he opened the policy in his own name; and therefore the broker had no right to retain the policy againſt the principal for his general balance againſt the agent. Then if this cannot be a ſubject of ſet-off between the parties, neither can it operate as payment to *Williams* and *Wilſon* in diſcharge of the plaintiffs' claim. Payment to an agent may be good as a diſcharge againſt the principal in thoſe inſtances where it may fairly be preſumed that the agent is authorized to receive it; but it cannot be ſuppoſed in the preſent caſe that the plaintiffs would authorize ſuch a payment as this, which is no actual payment, but

(*a*) 1 *M. & S.* 140. (*b*) 5 *G.* 2. *c.* 30. *ſ.* 28. (*c*) 1 *Eaſt*, 335.

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merely ſtriking off ſo much as the proceeds amount to, from the credit ſide of the account current between the defendants and *Williams* and *Wilſon*.

Puller, for the defendants, reſted their caſe on the ground of payment. He contended that this caſe differed from all the former, inaſmuch as it is found that *Williams* and *Wilſon* were employed by the plaintiffs as their agents, in the management of the property conſigned to them from *Nevis*. They were therefore ſomething more than mere agents for ſale, having a general control over the property to diſpoſe of it in the manner they might think beſt. It is ſaid that *Williams* and *Wilſon* could not pledge; but ſurely they might ſell and receive the value; and the caſe ſtates, that when they indorſed the bill of lading to the defendants, they received the value in acceptances: which is equivalent to payment (*a*). It was therefore a delivery of the ſugars to the defendants upon payment made by them inſtanter, or rather by anticipation before the ſugars were delivered; which is in effect a complete ſale. As to the ſubſequent bankruptcy of *Williams* and *Wilſon*, that cannot alter the rights of the defendants after payment made by them, if *Williams* and *Wilſon* had a right to ſell and receive payment. The caſe of *Wright* v. *Campbell* (*b*) comes the neareſt to the preſent, and that was conſidered as a caſe of ſale and not as a pledge. In *Maanſs* v. *Henderſon* it was only decided that the policy-broker who dealt with the agent, had no lien upon the policy as againſt the principal, for a general balance due from the agent; but the Court allowed the lien to the extent of the premium on

(*a*) *Lickbarrow* v. *Maſon*, 6 *Eaſt*, 25. *in note, per Buller* J.
(*b*) 4 *Burr.* 2046.

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the policy; and therefore that case, if at all in point, is certainly not unfavourable to the argument, that where payment has been made upon a specific thing to a party entitled to receive it, to that extent the party making the payment will be protected. Now this was a payment by means of acceptances given to the party who had a right to receive them in exchange for the sugars, and it was made, as appears from the case, according to the usual course of business. If it had been made in specie, can it be doubted that it would have been good? And being by acceptances makes no difference. In *Pickering* v. *Busk* (*a*) the Court held a sale by the agent would bind the principal, where it was done in the usual course, and the agent was in a condition to sell; and *Moore* v. *Clementson* (*b*) is not an authority to the contrary, because there the seller was known to be a mere factor. Here the single circumstance of the consignment being made to *Williams* and *Wilson* on account of the plaintiffs, did not indicate to the defendants that they were only factors in this instance, so as to take it out of the usual course of their dealing. At all events, the plaintiffs should have made their demand before the *May* following, in order to give the defendants the earliest opportunity of resorting to the funds of *Williams* and *Wilson*.

Lord ELLENBOROUGH C. J. This is a very clear case. It is an action by the proprietors of certain hogsheads of sugar consigned from *Nevis* to *Williams* and *Wilson* their factors, under a bill of lading directed to them or their assigns. The first question is, whether the bill of lading notifies to whom the property belongs. Now that ques-

(*a*) 15 *East*, 38. (*b*) 2 *Camp. N. P. C.* 22.

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tion is answered by the fact, for the bill of lading specifically states that the goods were shipped on account and risque of the heirs of Lady *F. Stapleton*, whose heirs the plaintiffs are. I think therefore there can be no doubt that that sufficiently designates the property. These sugars, together with the rest of the cargo of the ship mentioned in the case, were shipped to *Williams* and *Wilson*, or their assigns, who were therefore entitled under this consignment to take possession of the whole for the benefit of the individual proprietors. In this situation *Williams* and *Wilson* indorse and put into the hands of the defendants the whole of the bills of lading, and instead of taking advances by acceptances, on account of this particular portion of the cargo, to the amount of about 2000*l.*, they take advances to the amount of 15,000*l.*, on what I call a pledge of the whole cargo. It was an advance not on a calculation of the value of these specific sugars, but on a calculation of the gross amount of the whole. It was an advance too upon pledge, and cannot be considered as a payment by anticipation upon a sale outright, as it has been argued; unless it can be shewn that the defendants stood in the situation of purchasers, which they never did. It certainly was contrary to the duty of *Williams* and *Wilson* as factors, to complicate the property of the heirs of Lady *Stapleton* with that of the other proprietors in one general advance taken upon the whole cargo. That it cannot be considered as a purchase is clear, because there was no person to look to ultimately for payment for these specific sugars, at the time when the advances were made, which there must be where there is a purchaser; but the defendants, according to their usual course of business, were to dispose of them and to account with *Williams* and *Wilson* for the proceeds: they were not the buyers,

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but the persons to obtain a buyer. It seems to me therefore that this was an unauthorized transaction of pledge by the factors, and consequently not binding on the plaintiffs. Then if the defendants have no right under the pledge, have they any other rights? They were aware of *Williams* and *Wilson*'s insolvency, before they commenced the sale of any part of the sugars. That, it may be said, would not of itself alter the rights of the parties, but still it operated as notice. But an act of bankruptcy afterwards takes place, by which the authority of the agent is revoked. A factor, though he may not be prevented from selling by the stoppage of his employers, yet when an act of bankruptcy intervenes, is bound to hold the proceeds of the sale for the proprietors of the goods; for if the property be only a trust in the hands of his employers, it will revert to the original proprietors. These plaintiffs therefore stand in the situation of parties who bring their action for the proceeds of property misapplied by the agent after his agency is at an end. It seems to me that the original property in the sugars still remained in them, and that *Williams* and *Wilson* could not, by this mode of dealing, convey it to the defendants, nor any lien in respect of it. The plaintiffs therefore are entitled to the proceeds which they claim, deducting the expences of sale.

GROSE J. This has been treated in argument as a case of sale by *Williams* and *Wilson*, to the defendants; and it has been insisted that the defendants having paid for the sugars have therefore a right to retain them. But looking at the transaction and the situation of the parties, I think there is nothing less like a sale than this.

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The goods were consigned from *Nevis* to *Williams* and *Wilson*, as factors, to be sold to others; but they were not so sold: on the contrary, they were put into the hands of the defendants, who advanced money upon them, but not as buyers, and after having sold them, now seek to retain the proceeds from the principals when the agents have become bankrupt.

LE BLANC J. The character of the different parties is distinctly stated on the case. The plaintiffs were the owners of a *West India* estate; *Williams* and *Wilson* were employed by them as agents in the management of the property consigned to them from such estate, and the defendants were brokers employed by *Williams* and *Wilson*. The question is, whether or not, this being a consignment of property to *Williams* and *Wilson*, or their assigns, specifically on account of the plaintiffs, the defendants, who received it from *Williams* and *Wilson*, under an indorsement of the bill of lading for the purposes of sale, can protect themselves from payment over to the plaintiffs of the proceeds, by having given their acceptances on account of this property, together with the rest of the cargo. It has been contended, on the only ground which could be taken, that this amounted to a sale at the time when *Williams* and *Wilson* put the property into the hands of the defendants to sell for them. Now let us see if it can be so considered. The case states that *Williams* and *Wilson* were in the habit of employing the defendants, and placing cargoes in their hands for sale, and of drawing bills upon them on account of such cargoes. This therefore was a habit of dealing not by way of sale to them of such cargoes; but by drawing in advance upon them as upon

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upon a pledge. It was placing goods in their hands and drawing upon them on account, not in the character of principals receiving payment for the goods, but in that of brokers employing others to make ſale for them, and receiving a groſs ſum in advance, to be afterwards adjuſted when the proceeds were finally accounted for. If then the plaintiffs afterwards interpoſe as principals, and call on the defendants as brokers before they have accounted with *Williams* and *Wilſon*, they have a right ſo to do and recover the money. In *Pickering* v. *Buſk* the Court came to the concluſion that it was a tranſaction of ſale authorized by the principal, and ſo expreſſed themſelves, without meaning to ſhake the grounds upon which it is held that a factor cannot pledge. It is immaterial to conſider, whether the facts of that caſe warranted the concluſion that the factor had authority to ſell; the principle upon which it was decided was, that it was a ſale and not a pledge. But it is perfectly clear that there is nothing like a ſale in this caſe, but a mere pledge; and therefore the plaintiffs are entitled to recover.

BAYLEY J. I am of the ſame opinion. A factor has no authority to pledge, becauſe it is out of the uſual and ordinary courſe of his dealing, but he may ſell. The queſtion then is whether this be a ſale or pledge. The caſe ſtates that theſe ſugars were conſigned with a variety of other goods to *Williams* and *Wilſon*, which other goods, as it has been ſuggeſted in the argument, were indorſed to them by the bills of lading as mortgagees, and if ſo, as to that part they may be conſidered as proprietors; but with reſpect to theſe ſugars they do not ſtand in the character of proprietors.

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The defendants had notice of this by the terms of the bill of lading; and do not give their acceptances upon an estimate of the value of this particular part of the cargo but of the whole. After the notice they had, the prudent course would have been not to have given their acceptances, payable to *Williams* and *Wilson*, but to the heirs of Lady *Stapleton*. It is said that they did nothing more than they were in the habit of doing; but it does not appear, whatever that habit might have been, that the plaintiffs were aware of it, or ever sanctioned such a course of dealing. Then it is said, that no demand was made by the plaintiffs until *May*; but non constat that they knew of the transaction before that time, and if the defendants were wrong in the first instance, this delay of the plaintiffs in advancing their claims, will not vary the rights of the parties.

Postea to the plaintiffs.

Tuesday, May 25th.

CUMMING *against* FORESTER and Others.

Where a broker effected policies of assurance in the name of his principal under a del credere commission: Held that he could not set off losses which happened on those policies in an action by the underwriter to recover premiums, although the losses claimed were total, and the broker had accounted for them with his principal.

IN indebitatus assumpsit for premiums of assurance, to which the defendants pleaded the general issue, with a notice of set-off, and by their bill of particulars claimed several sums as due to them for losses upon several ships, (which were total losses), the cause was referred to arbitrators; who being in doubt whether the defendants were entitled by law to their set-off, stated the material facts on their award, to the following tenor, in order to enable the parties to take the opinion of this

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Court; "We do find and declare that the plaintiff, *Robert Cumming*, being an underwriter, underwrote in account with the defendants, as brokers, divers policies of insurance, and amongst others, certain policies filled up in the name of *James Hill*, the assured, by whom the defendants were employed: that the defendants at the time of effecting the said policies for *Hill*, guaranteed the solvency of the plaintiff and other underwriters on the said policies to *Hill*, and sent the policies to him with their guarantee indorsed thereon, and charged and were allowed by him a del credere commission upon them; but there was no proof before us that the plaintiff was acquainted with the fact of such guarantee until the losses on the said policies hereinafter mentioned were claimed. We farther find that losses upon the said policies effected for *Hill* happened, for which the plaintiff was liable as an underwriter on the same; which policies were then returned into the hands of the defendants to get adjusted by the underwriters, and the said losses in respect of the subscriptions of the plaintiff on the said policies were settled, allowed, and paid in account by the defendants with and to *Hill* under and by virtue of their said guarantee, before the said action was brought; the plaintiff having previously stopped payment, and withdrawn himself from business on account of the deranged state of his affairs; and we further find, that at the time of the commencement of the said action a balance of premiums of insurance was due and payable from the defendants to the plaintiff, amounting to the sum of 728*l.* 18*s.* 1*d.*; we find that the said losses settled and paid by the defendants to *Hill*, under their guarantee to *Hill*, exceeded the said sum of 728*l.* 18*s.* 1*d.*; but we award and declare upon

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the facts aforesaid, that the defendants are not entitled to set off the said losses against the said balance or sum of 728*l.* 18*s.* 1*d.*; and we therefore award, order, adjudge, and determine that the defendants do and shall, on the 6th of *January* now next ensuing, pay to the plaintiff the said sum of 728*l.* 18*s.* 1*d.*" The defendants having refused to pay this money, a rule nisi was obtained for an attachment, and the case coming on to be heard at the end of the last term, the Court directed the matters to be stated in the form of a special case; and the question under the above circumstances, now stated for the opinion of the Court was, whether the amount of the losses mentioned in the award could be legally set off in this action against the plaintiff's demand. If the Court shall be of opinion that the amount of such losses can be set off, the rule for the attachment is to be discharged, otherwise to be made absolute without costs.

Abbott, for the plaintiff, contended that these losses could not be set off; 1st, because they were unliquidated damages; 2dly, because a broker cannot set off losses on policies effected for his principal, although the broker may have acted under a commission del credere. 1st. Being unliquidated damages, they are not within the statute of set-off (*a*), which applies only to debts, or such demands, upon which, before the statute, the defendant on action brought, might have paid money into court, but that could not have been done in the present instance, until 19 *Geo.* 2. *c.* 37. The cases of *Grove* v. *Dubois* (*b*), and *Bize* v. *Dickason* (*c*) do not apply;

(*a*) 2 *G.* 2. *c.* 22. *s.* 13.
(*b*) 1 *T. R.* 112.
(*c*) 1 *T. R.* 285.

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for these cases turned on a different statute (a), which extends to mutual credit as well as mutual debts, and therefore has received a more enlarged construction. Here, if as in *Wienholt* v. *Roberts* (b), the party had acknowledged losses to a specific amount, it might have been argued that that amounted to an adjustment, and the demand became liquidated, and in the nature of an account stated, and then perhaps a set-off might be allowed; but without any adjustment, the losses remained unliquidated until ascertained by recovery in an action for damages; and the arbitrators in this case had no power to ascertain them, because the cause only, and not all matters in difference, was referred to them. 2dly, Supposing these losses capable in their nature of being set off, still the defendants, as brokers, are not entitled to set them off. A del credere commission, whatever difference it may make between the broker and his employers does not operate as between the broker and a third person, to place the broker in the situation of principal, especially in a case where he does not assume to act as principal. Now here the policies were all effected in the name of the principal, so as to give the defendants not even a prima facie right to maintain an action in their own name, and to afford the plaintiff no notice that any other person than the principal was interested in them. And this is another circumstance of distinction from *Grove* v. *Dubois*; for there the policy was filled up in the name of the broker, and the principals were unknown to the underwriter, so that the whole dealing was between the broker and the underwriter. In that respect therefore the case

(a) 5 G. 2. c. 30. s. 28.

(b) 2 *Camp. N.P.C.* 586.

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was analagous to that of a factor, who, until his principal be diſcloſed, may ſue in his own name.

Campbell, contrà, urged the propriety of allowing the ſet-off in this caſe, as well to avoid circuity of action, as becauſe theſe being total loſſes, were in the nature of liquidated damages; and as to there being no adjuſtment in this caſe as there was in *Wiesholt* v. *Roberts*, the ſame might be ſaid of *Grove* v. *Dubois*, and *Bize* v. *Dickaſon*. It is true that in *Grove* v. *Dubois* *Buller* J. ſaid that the notice of ſet-off was bad, but that was becauſe the loſſes were not paid over by the defendant to his principals before the bankruptcy of the underwriter. Both thoſe deciſions however turned upon the effect of a commiſſion del credere, and therefore are in point, and govern the preſent. If the defendants might have a croſs-action againſt the plaintiff for the amount of theſe loſſes, why may they not ſet them off? And it ſeems clear that they might maintain ſuch action, inaſmuch as they have been obliged, through the default of the plaintiff, to make good thoſe payments which he was bound to make; it was therefore a compulſory payment on the part of the defendants, and releaſed the plaintiff from all farther demand of the aſſured, *Godſal* v. *Boldero* (*a*); and therefore the law will imply a promiſe by the plaintiff to repay them, *Exall* v. *Partridge* (*b*), *Jenkins* v. *Tucker* (*c*); and in *Child* v. *Morley* (*d*), Lord *Kenyon* ſaid that if the broker had been bound as guarantee, there could have been no doubt he might have maintained the action.

Lord ELLENBOROUGH C. J. This is an action by an underwriter to recover againſt his brokers certain pre-

(*a*) 9 *Eaſt*, 81. (*b*) 8 *T. R.* 308. (*c*) 1 *H. Bl.* 99.
(*d*) 8 *T. R.* 614.

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miums not paid over. In the usual course of things the underwriter acknowledges upon the face of the policy the receipt of the premium, which is an admission that he has received it through the intervention of the broker, and has no claim against the assured. His claim therefore against the broker is perfect, unless it be met by the broker with a claim of set off. Here the claim of the brokers to set off arises out of an unauthorized contract made by them with their employers, without the privity of the plaintiff. But I cannot help thinking the doctrine resorted to in the argument as to the right and liability consequent upon a guarantee goes too far. I cannot conceive how a contract between *A.* and *B.* can vary the rights between *B.* and a third person who is a stranger to it, and empower *B.* to set up a claim against him as derived out of that contract. Perhaps something may be found in the decisions which would carry this liability to a greater extent than I think is warranted. But independently of that question, suppose the assured in this case had been sued for premiums, could he set off unliquidated losses, and what more do these defendants claim to set off? But the statutes of set-off apply only to mutual debts, and are therefore not like the statute of bankrupt, which embraces mutual credit, and upon which the case of *Grove* v. *Dubois* turned; and it is sufficient to say that mutual credit ex vi termini imports unliquidated damages, and when they can be so arranged the account may be taken between the parties. Therefore in that respect the case of *Grove* v. *Dubois* does not apply; and besides, there the dealing was with the defendant as a principal. As to compulsion of law, it was a compulsion of the defendants' own seeking, which arose out of their own

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voluntary act, and the caſe is not like *Exall* v. *Partridge*, where the money was paid by the party under compulſion of law to redeem his property from a diſtreſs not of his own creation. But no perſon can, by payment under a voluntary contract acquire a right againſt a ſtranger which he had not before; the diſtinction is if it be by compulſion. In this caſe there is no pretence for a ſet off, for the aſſured originally could not have claimed to ſet of theſe loſſes, and no bankruptcy has intervened to bring this caſe within *Grove* v. *Dubois*.

Per Curiam, Rule abſolute.

Tueſday, May 25th.

THISTLEWOOD *againſt* CRACROFT and DARLEY.

Money *fairly* loſt at play cannot be recovered back in an action of debt for money had and received not founded on the ſtatute.

DEBT for money had and received. *Cracroft* ſuffered judgment by default. *Darley* pleaded nil debet. At the trial before Lord *Ellenborough* C. J. at the laſt *London* ſittings, it appeared from the defendants' anſwer to a bill filed againſt them in the Court of Chancery, which was read by the plaintiff, that the money ſought to be recovered in this action had been loſt by the plaintiff at play, at a gaming-houſe in *St. James's-ſtreet*. The plaintiff, who was a ſtranger to the defendants, had gone to this houſe at an early hour in the morning, and propoſed to play with *Cracroft* at hazard for a larger ſum than he choſe to play for, whereupon *Darley*, with whom *C.* had no previous communication, and whom he only knew by name, propoſed to *C.* that each of them (*C.* and *D.*) ſhould put down 50*l.*, and ſo form a bank to meet the loſſes that might enſue from playing for ſuch high ſtakes, and that the profits and loſſes ſhould be borne and di-

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THISTLEWOOD against CRACKNELL.

vided equally between them. After playing for some time they desisted, when it was found upon reckoning up the money in the bank, which had never been removed from the table, or out of sight during the time of playing, that the defendants had jointly won from the plaintiff 841*l.*, which they divided between themselves according to the agreement, after making a deduction of 126*l.* for money lost by them to two persons in bets relating to chances in the course of the play, and another of 7*l.* for the waiters. The plaintiff threw the dice himself during the whole time; and the money was won fairly in the course of play. The declaration not concluding according to the form of the statute (*a*), the plaintiff was precluded from claiming to recover as for money lost at play, but insisted upon his right to recover as for money paid on a void or illegal consideration; to which it was answered for the defendant, that it appearing that both parties were in pari delicto, the rule potior est conditio possidentis applied. His Lordship inclined to this opinion, but directed the jury to find for the plaintiff for 708*l.*, reserving liberty for the defendant to move on this point. Accordingly *Staveley* having on a former day in this term obtained a rule nisi for setting aside the verdict and entering a verdict for the defendant *Darley*,

Park and *Comyn* now shewed cause, and compared this to the cases of *Jaques* v. *Golightly* (*b*), *Browning* v. *Morris* (*c*), and *Jaques* v. *Withy* (*d*), where two parties having been engaged together in lottery insurances, the

(*a*) 9 *Ann. c.* 14. *s.* 2.
(*b*) 2 *Bl. Rep.* 1073.
(*c*) *Cowp.* 790.
(*d*) 1 *H. Bl.* 65.

Court

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EASTWOOD against CRACROFT.

Court permitted the one who had paid his money for ſuch inſurances to recover it back from the other who received it; and yet the tranſaction being illegal, both might in ſome meaſure be conſidered as in pari delicto. So here both have been concerned in a matter prohibited by law; but the queſtion is whether the defendant be not the greater delinquent. Notwithſtanding it is ſtated that the money was won fairly, the natural concluſion from all the facts is, that the defendants were leagued together to ſtrip the plaintiff of his money, which they agreed to ſhare; and therefore he is the party impoſed upon by the other, and not ſtrictly in pari delicto. Upon this diſtinction the action in *Williams* v. *Hodly* (*a*) was held maintainable.

The Attorney-General and *Staveley* contrà were ſtopped by the Court.

Lord ELLENBOROUGH C. J. If the Court diſcovered any traces of foul play in this caſe, ſo as to form a ſhade of delinquency between theſe parties by making it a caſe of oppreſſion or fraud upon one, they would eagerly have interfered in order to adminiſter relief. But if all has been fair between them, then both parties are equally delinquent. In the caſes which have been mentioned of the lottery inſurances, the ſtatute was conſidered as intended to protect the individual, and to mark the lottery-office keeper as ſtigmaticus, the one being likely to be oppreſſed or impoſed upon by the other; and on that view of the ſtatute thoſe deciſions turned. In this caſe there is nothing to point out any diſparity of delinquency between the parties.

(*a*) 8 *East*, 378.

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THISTLEWOOD against CALCRAFT.

LE BLANC J. (a) The transaction no doubt was illegal, but there seems to be no imputation of foul play to entitle the plaintiff to ask for relief.

Per Curiam, Rule absolute.

(a) *Grose* J. had left the court.

THE KING *against* The Governor and Company of the NEW RIVER.

Wednesday, May 26th.

Land of which the annual value is improved by a spring rising within it may be rated to the poor at such improved value, although the owners of the land who are also occupiers do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies.

UPON appeal by the Governor and Company of the *New River*, against a poor-rate made for the liberty of *Little Amwell*, charging them in respect of land in their occupation in *Chadwell Mead*, on the ground that they were charged at a higher rate or sum than the real value thereof, and also at a higher proportion than the other occupiers of land in the same liberty, the court of quarter sessions for the county of *Hertford* confirmed the rate, subject to the opinion of this court on the following case:

In a rate duly made and published on the 26th of *August* 1812, for the liberty of *Little Amwell*, in the county of *Hertford*, the Governor and Company of the *New River* are rated as follows;

Rental,

£300.—Governor and Company of the *New River* for Land in *Chadwell Mead* - - £15 0 0

The Governor and Company of the *New River* were incorporated by charter, dated 21st of *June* 1619, for the purpose of conveying water from a certain spring rising in *Chadwell Mead*, in the liberty of *Little Amwell*, to the cities of *London* and *Westminster*; and do

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do ſupply a great part of the ſame with water, by means of a cut called the *New River*, leading from the ſpring to a head or reſervoir at *Iſlington*, whence it is diſtributed by means of engines and pipes to the different parts of the metropolis, and from which the company receive conſiderable profit beyond the ſum at which the property in queſtion is rated. The water of the *New River* is derived from two ſources, part from the river *Lea*, from which there is a cut communicating with the *New River*, near *Chadwell Mead*, and part from a ſpring riſing and incloſed in a baſin in *Chadwell Mead*, which is the ſubject of the preſent rate, and is the freehold of the *New River* Company, and in their occupation. The quantity of water derived from each of theſe ſources is nearly equal. That part of *Chadwell Mead*, which is occupied by the company and is the ſubject of the rate, contains about two acres; it conſiſts ſolely of the baſin in which the ſpring riſes, and ſo much of the cut from thence called the *New River* as lies in the liberty of *Little Amwell*, where it joins the water taken from the river *Lea*, and from thence it continues to run with the ſaid water ſo taken from the river *Lea* in one joint courſe to *Iſlington*. The ſaid land alone without the ſpring, and if it were not covered with water, is of the annual value of 5*l*. The whole profits of the company ariſe from the ſale of the water, no part of which is diſtributed, nor is any of the money received for it by the company, nor does any become due in the liberty of *Little Amwell*. If the advantage which the company derive from the uſe of the ſpring may by law be included in the rate upon the land, the land and the ſpring of water together are of the annual value at which they are rated.

Bourchier

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The KING *againſt* The NEW RIVER Company.

Bourchier, in ſupport of the order of ſeſſions, after obſerving that this was a rate on land which the ſeſſions had found to be of the annual value of 300*l.*, contended that the circumſtance of the company being owners as well as occupiers of the land could make no difference when the annual value was once aſcertained, although that circumſtance, from there being no rent, might create a greater difficulty in aſcertaining ſuch value. He relied on *Rex* v. *Miller* (*a*), as deciſive of and not diſtinguiſhable from the preſent caſe. It may perhaps be argued that in that caſe the water of the ſpring which was held to be part of the produce of the land was conſumed and became profitable on the land, whereas here it is carried to a diſtance before it makes a return, and therefore the land is not profitable within the liberty; but that is an argument founded upon falſe premiſes, aſſuming that land cannot be profitable unleſs the produce be conſumed or converted into money within the pariſh; which is confounding the profits with the produce of land. To yield profit the land muſt be productive, but the produce need not be converted into profit on the land or within the pariſh; which in many caſes is impoſſible, and in moſt very unuſual, and muſt depend altogether upon the diſtance of the market. Land producing corn, or land under which veins of coal are worked (*b*), is rateable in the pariſh where it is ſituate, although the produce is diſpoſed of and becomes ultimately profitable at diſtant markets. The caſe of *Rex* v. *Miller*, therefore, is in all its bearings in point; and has no diſtinction in fact, unleſs that being a mineral ſpring and this a ſpring of common water can be called a diſtinction. As to any ſuppoſed analogy between this

(*a*) *Cowp.* 619. (*b*) *R.* v. *Parrot*, 5 *T. R.* 593.

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and the cases of tolls upon canals, it will be found upon a very slight examination of the principle which governs those cases, that no such analogy prevails. Tolls are held not to be rateable except in the parish where they become due for this reason; because they do not exist as tolls until the voyage in respect of which they accrue is completed, and then only they have a locality; which reason, it is difficult to apply to land. Neither is *Rex* v. *Sculcoates* (*a*) applicable; because that case turned altogether upon the absence of any assignable benefit arising to the commissioners from the drainage; here it is found that the company do derive a benefit, which is capable of and has in fact been estimated. In *Rex* v. *The Corporation of Bath* (*b*), the Court were of opinion that the corporation were rateable for their springs and reservoirs in the parish where those reservoirs were situate, not because the profits were received, but because the property was productive within the parish; but that they were not rateable for profits derived to them from the use of land in other parishes; but here the company is not rated for such profits. All that is done here is to rate the company in respect of land found to be in their beneficial occupation, including a spring as a part of the produce of such land, the annual value of which has been ascertained.

Berens, *Trollope*, and *Walford*, contrà, contended that this rate could not be supported at all, or at all events not to the extent imposed. There must not only be an occupation, but a beneficial occupation in the parish where the land lies, which imports something accruing to the occupier of the land in that parish. And *Rex* v. *Miller* is consistent with this doctrine; for it was there

(*a*) 12 *East*, 40. (*b*) 14 *East*, 609.

stated

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ſtated that the profits aroſe from the ſale of the mineral water, and the company reſorting thereto, which therefore muſt have been received in the pariſh. A ſimilar obſervation may be made on the caſe of the coal-mine; for it does not appear but that the coals were ſold at the pit's mouth. But *Rex* v. *Sculcoates* ſeems deciſive, inaſmuch as it was there conſidered that parties are not rateable merely in reſpect of their occupation, unleſs the property yield a pecuniary benefit within the pariſh. Now that applies directly to this caſe, where it is expreſsly ſtated that no part of the profits either become due or are received within the liberty; and therefore if the property be rateable there, the company will be liable to a double rate, being rateable alſo in the ſeveral pariſhes where the profits are received; for that was ſo decided in *Rex* v. *The Corporation of Bath*. It is ſaid that here is land in the company's occupation, but it does not therefore follow that they are rateable: in *Rex* v. *Sculcoates*, Lord *Ellenborough* C. J. ſaid, "I know of no inſtance where a canal company has been held rateable for the mere ſpace occupied by the canal if no tolls were received or became due there; and I cannot diſtinguiſh between land converted into a drainage and a canal." So here it may be ſaid the company are not rateable for the mere ſpace occupied by the baſin and ſpring, if no profit is received or becomes due there: and this principle is ſtrictly analogous to all the caſes from *Rex* v. *Page* (*a*) downwards, reſpecting the rateability of tolls.

Lord ELLENBOROUGH C. J. This is a rate impoſed on land, including a ſpring of water, as being of the aggregate annual value of 300*l*. The caſe finds, "that the land alone, without the ſpring, and if not covered

(*a*) 4 *T. R.* 543.

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with water, is of the annual value of 5*l.*; but if the advantage which the company derive from the uſe of the ſpring may by law be included in the rate upon the land, the land and ſpring together are of the annual value at which they are rated." Much of the argument againſt this rate ſeems to me to be built on a perverſion of the terms of this finding. We are deſired to read the caſe as if the words were "if the *whole* advantage of the concern may be included in the rate;" whereas nothing like that is ſtated; but only "if the advantage which the company derive from the uſe of the ſpring:" and the rate is expreſsly ſtated not to be impoſed upon the whole advantage which they derive. I am at a loſs, therefore, to diſcover, between this caſe and *Rex* v. *Miller* any other diſtinction than that which has been alluded to, viz. that the quality of the two waters is different, the one being a mineral and the other plain water. It has been aſſumed, indeed, that in that caſe all the profits were received in the pariſh where the land lay; but the caſe does not warrant any ſuch concluſion; and we know perfectly well that the mineral water in queſtion in that caſe is diſpoſed of in great quantities at diſtant places. It may be ſaid alſo that in this caſe the owners of the property are alſo the occupiers, but there the property was in the occupation of a tenant; to which the anſwer has already been given, viz. that that circumſtance is no otherwiſe material than as it affords a more eaſy criterion for aſcertaining the annual value. Here, then, is land, and water incloſed in a baſin upon the land, which falls within the legal deſcription of land; and although a conſiderable portion of the profits of ſuch water is derived from pipes, through which it is diſtributed to other places, yet it is found that the water has a certain aſcertained value at the fountain-head: and

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in cases of this kind it is enough to ascertain the local value of the property, without inquiring whether it yields a return on the spot. A degree of confusion has arisen from comparing this to the case of tolls upon canals; whereas they are essentially different; for tolls are an incorporeal hereditament, and have no local corporeal existence so as to be the subject of rate until they become due. Then we have been pressed with the case of *Rex* v. *Sculcoates*, where it was holden that the commissioners in whom a drainage was vested were not rateable; but that was so holden upon the principle that where there is not a scintilla of benefit derived from the occupation, the property is not rateable: there the commissioners were merely servants of the public, having no divisible fund in their hands either as trustees or to their own benefit, and deriving no advantage from the drainage; and the only persons benefited by it were the owners of lands in other parishes. In *Rex* v. *Bath* it was assumed in the decision, that the water was the subject of rate in the parish where it was impounded in the reservoirs; the only question there being, whether the corporation were rateable in that parish to the extent of all the profits received by them, or whether the rate ought not to have been framed with reference to the contributory profits derived to the company in other parishes. Without going farther into the several cases upon this subject, and feeling no disposition to overrule the case of *Rex* v. *Miller*, I think there is no doubt that the sessions have come to a right decision. The property is locally valuable in the parish where it is rated, although that value is derived from extrinsic circumstances, and although the profits are actually received elsewhere.

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GROSE J. No perſon conſidering this caſe can entertain a doubt. It is admitted that the ſpring and the land in which it riſes are the freehold of the company, and in their occupation. The only queſtion is, whether it is a beneficial occupation. Upon that ſubject there cannot be a reaſonable doubt; for it is ſtated in the caſe, that the land including the ſpring is worth 300*l.* per annum, and that the company do derive a conſiderable profit from it. It would be ſtrange, therefore, if the Court ſhould hold that it is not rateable. I cannot diſtinguiſh this caſe from the common caſe of land on which corn grows. In ſuch caſe the land is aſſeſſed according to its value, and that value is eſtimated according to that which it produces: ſo here the land produces a ſpring, and the value of it is to be computed according to the benefit which the ſpring produces to the company. I ſay nothing as to the quantum of the rate, that being a queſtion wholly in the diſcretion of the ſeſſions: here we have only to decide on the rateability of the property.

LE BLANC J. The queſtion ariſes on the validity of a rate made for the liberty of *Little Amwell*. By that rate the *New River* Company are rated for land at a certain ſum; which rate is impoſed on them as occupiers of local corporeal property within the liberty. No rule is clearer than this, that it is not the buſineſs of this Court to enter into inquiries as to the value found by the ſeſſions, whether it be eſtimated at too high a rate or not. The ſeſſions may poſſibly have put too high a value on the property, but with that queſtion this Court does not interfere, nor indeed is it ſubmitted to us. The only queſtion upon which we are required to deliver

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deliver our opinion is, whether this property be rateable, and whether the ſeſſions, in forming their judgment on that point, have taken into their conſideration circumſtances which they ought not. The ſubject-matter of the rate is land: and the caſe ſtates that the land taken independently of the ſpring, is of the annual value of 5*l.* only; but if the ſpring and the advantage derived from it by the company may be taken into conſideration, then the land is not rated at more than its value. That brings it to the queſtion, whether in eſtimating the value of land, ſomething which is peculiar to the land, and makes it more profitable to the occupier than if it were away, can be taken into conſideration: and that queſtion has already been determined in *Rex* v. *Miller*, which, as it ſeems to me, cannot be diſtinguiſhed from the preſent caſe. That was a caſe where land, being rendered more productive by reaſon of a mineral ſpring ariſing within it, was held rateable at ſuch increaſed value. The only feature of diſtinction between the two caſes is this, that here the company do not receive any of the profits of the water on the ſpot, whereas it is contended that in *Rex* v. *Miller*, it may fairly be preſumed (for it is not ſo ſtated in the caſe) that the profits were received at the fountain-head in the pariſh where rated; but does it make any difference to the occupier whether he takes the profits of his land by ſelling the produce on the land itſelf, or by diſpoſing of it elſewhere? Suppoſe a man occupying land out of which he digs brick-earth, and converts it into bricks in an adjacent pariſh; would he not be liable to be rated as for brick-land in the pariſh where the land lies, in the ſame manner as if he had ſold the bricks in that pariſh? Particular expreſſions taken from caſes diſſi-

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milar in their circumſtances have been dwelt upon, in order to impreſs upon the Court the rule that there muſt be a beneficial occupation in the pariſh; to conſtitute which it is ſaid that the profits muſt be received there. But the caſes of tolls are by no means applicable, which are only of value at the place where they become due, and not like land which is of a certain permanent value in the place where it is ſituate. With reſpect to *Rex* v. *Sculcoates*, that caſe proceeded on the ground that the parties rated had not the beneficial occupation of any property whatſoever which could be the ſubject of rate; but here the company are found to be in the actual occupation of land which produces a profit. Whether they are liable to be rated in every pariſh through which the line of river paſſes is a queſtion which at preſent it is not neceſſary to determine: nor is it material for us to inquire whether the ſeſſions have made a higher eſtimate of the profits than they ought to have done. It is ſufficient for our deciſion that it is found by the caſe, that there is an occupation of local and viſible corporeal property within the liberty, which is rendered of greater value by reaſon of the ſpring, than it would be without. Under theſe circumſtances, unleſs we were to overturn the caſe of *Rex* v. *Miller*, we muſt hold this property to be rateable.

BAYLEY J. I think it is clear, that the company are liable to be rated for the ſpring, which is part of the produce of the land. The company have the means of carrying this produce to market, where it affords a beneficial return; and it can make no difference whether they convey it along a canal or in carts and waggons or by any other mode. It is ſtill the produce of the land,

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which, when brought to market, produces a profit. The caſe of tolls upon canals is perfectly diſtinguiſhable, becauſe tolls exiſt as local viſible property in the pariſh where they accrue, and before they can be rated all the caſes have held that they muſt exiſt as a toll; but this is a rate on land ſituate in the pariſh. The fallacy of the argument lies in applying to land a rule applicable to one ſpecies of incorporeal property, and deducing from thence that the profits of land muſt be rated in the pariſh where they are received, and not where the land lies; and that this company is liable to be rated in that pariſh to the full extent of the profits received. But this is not a rate on the profits which the company acquire, but on the land which they occupy. The queſtion then is, what land do the company occupy within the liberty, not what profits do they receive there; and what is its annual value. It appears that they occupy this land, the value of which is improved partly by the ſpring, and partly by reaſon of channels and pipes in other lands, through which the water is conveyed to the conſumer. Perhaps, therefore, it may be fair that in fixing the quantum of rate on this property reſpect ſhould be had to the benefit which reſults to the company in the different pariſhes through which the water is conveyed. But this obſervation applies only to the quantum, with which we have nothing to do: here it is quite clear that the company have a beneficial occupation of land in *Little Amwell*, and are therefore liable to be rated.

Order of Seſſions confirmed.

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The KING *against* The Inhabitants of BURWITH.

expreſsly veſted in the truſtees of the turnpike; but ſtill it muſt be conſidered as a branch of the turnpike. In *Rex* v. *Elvet* (*a*) it was ſo conſidered, although the words turnpike-road were not uſed in the local act.

Lord ELLENBOROUGH C. J. It is true the words turnpike-road did not occur in the act upon which *Rex* v. *Elvet* was decided. But the commiſſioners under that act were truſtees of the road; and it was to all intents conſidered as a turnpike road. As to the renting, it is enough for us to decide on the doubts which the ſeſſions actually entertained; and they have not ſtated any doubts upon that ſubject; for they have ſtated ſimply that the pauper rented the tolls, which muſt be underſtood a legal renting. Then the only queſtion remaining is, whether tolls are a tenement. There is no doubt that they are ſo generally; but it is ſaid that here they cannot be ſo, becauſe the act has made the ſhares of the proprietors perſonal eſtate. That, however, does not make them leſs a tenement in the hands of the perſons to whom demiſed: ſuppoſe the act had veſted the ſhares in the proprietors for a term of years, they would ſtill have been a tenement.

LE BLANC J. In *Rex* v. *Elvet* the Court deemed it a turnpike-road; the act enabled the commiſſioners to erect turnpikes on the high road.

Per Curiam, Order of Seſſions confirmed.

(*a*) 11 *East*, 93.

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GLADSTONE and Others, Aſſignees of JAMES SILL and WILLIAM WATSON, Bankrupts, *againſt* HADWEN. (*a*)

Friday, May 28th.

TROVER by the plaintiffs, as aſſignees of *Sill* and *Watſon*, who carried on trade at *Liverpool* under the firm of *James Sill* and Company, againſt the defendant, for the recovery of the value of divers bills of exchange, amounting to 1810*l.* 16*s.* 6*d.*, and of a certain draft drawn by the defendant on his own bankers for 2139*l.* 6*s.* 6*d.*, and of two Bank of *England* notes for 5*l.* each. At the trial at *Lancaſter*, at the ſummer aſſizes 1811, a verdict was found for the plaintiffs for 1820*l.* 16*s.* 6*d.*, ſubject to the opinion of the Court on the following caſe:

On *Thurſday* the 25th of *October* 1810 *James Sill* applied to the defendant for the loan of 8000*l.*, telling him that he was in want of that ſum to meet certain acceptances of *Sill* and Co., part of which would be due on the *Saturday* and part on the *Wedneſday* following, and that he would give him ample ſecurity. The defendant thereupon delivered to *Sill* bills of exchange to the amount of 1860*l.* 14*s.* 6*d.*, and alſo a draft drawn by the defendant on his own bankers for the ſum of 2139*l.* 6*s.* 6*d.*, but which was never accepted, and received from *Sill* as the ſecurity propoſed a certain paper writing addreſſed to him (the defendant) to the tenor following;

Where *S.* obtained bills of exchange from the defendant upon a fraudulent repreſentation that a ſecurity given by him to the defendant (which was void) was an ample ſecurity, and on the next day having reſolved to ſtop payment, informed the defendant that he had repented of what he had done, and had ſent expreſs to ſtop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one, which had been diſcounted), and alſo two bank-notes, part of the proceeds of ſuch diſcount, and the defendant delivered back the ſecurity, and afterwards a commiſſion of bankruptcy iſſued againſt *S.*, the aſſignees under which commiſſion brought trover againſt the defendant for the bills and bank-notes: Held that the defendant was entitled to retain them.

(*a*) This caſe was argued at *Serjeants' Inn.*

"We

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commiſſion of bankruptcy iſſued againſt *Sill* and *Watſon*, who were duly declared bankrupts, and an aſſignment of their eſtate and effects was made to the plaintiffs, and the defendant converted to his own uſe the bills, drafts, and bank-notes ſo received by him.

The queſtion for the opinion of the Court is, whether the plaintiffs are entitled to recover: if they are ſo entitled, the verdict is to ſtand for 1810*l.* 16*s.* 6*d.*, and 10*l.*, both or either of thoſe ſums as the Court ſhall direct: if not, a nonſuit to be entered.

Richardſon, for the plaintiffs, contended that this caſe preſented the common caſe of a loan upon ſecurity, which ſecurity afterwards turns out to be bad; and that *Sill* having made no communication to the defendant of his intention to reſcind the loan by returning the bills, until after he had determined to ſtop payment, was not then in a condition to exerciſe an election. The promiſe to return the bills was made in contemplation and upon the eve of bankruptcy, and was void as being a fraudulent preference; and the bills were not returned until after the bankruptcy; and even then not in their entire ſtate, but after one of them had been diſcounted; which ſhews that the bankrupts had the control over the whole: the defendant, therefore, had no right to retain them. At all events, he is not entitled to the two bank-notes, for by diſcounting the bill the bankrupts made the proceeds their own, whatever may be the right as to the remaining entire bills, and they had the bank-notes in their poſſeſſion, order, and diſpoſition at the time of their bankruptcy within the 21 *J.* 1. *c.* 19. But that the property in the whole paſſed to the bankrupts at the time of the firſt delivery of the bills to *Sill* by the defendant, may

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may be further illuſtrated by analogy to caſes in the criminal law. Suppoſe the queſtion had ariſen upon an indictment againſt *Sill* for a felony, and it had appeared that he obtained theſe bills by this fraud; could there have been a doubt upon adjudged caſes that he would have been entitled to an acquittal, on the principle, that where the owner intends at the time to part with the property, it cannot be a felony? Perhaps, therefore, the defendant could not have maintained trover for theſe bills againſt the bankrupts themſelves, ſuppoſing them not to have become bankrupts; for it might have been ſaid, that he had actually parted with the property to them; but admitting, in that caſe, that the bankrupts would not have been entitled to retain by reaſon of their fraud; ſtill innocent aſſignees may be entitled to hold for innocent creditors where the bankrupt would not.

Littledale, for the defendant, inſiſted that the delivery of the bills to *Sill* worked only a change of poſſeſſion and not of property. It was obtained by fraud and under a falſe pretence of the value of the ſecurity given in exchange; and where a party exchanges one thing for another, knowing the thing that he offers in exchange is not his own, there no change of property takes place, but only a mere change of poſſeſſion. Perhaps no caſe will be found expreſsly deciding that poſition; yet in 6 *Mod.* 114. *Anon*, *Holt* C. J. inclined to the opinion that a ſale of goods on credit obtained by fraud, would not alter the property: the contrary indeed ſeems to have been held in *Parker* v. *Patrick* (*a*), but there the rights of third perſons intervened; and, therefore, ſuppoſing that

(*a*) 5 *T. R.* 175.

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decision to be right, the general rule will still hold good, that as between the parties themselves every contract founded in fraud is void. Even a sale in market overt, if made by covin, will not bar him that hath the right (*a*). The cases alluded to from the criminal law proceed on a rule peculiar to cases of felony, and altogether foreign to other cases; which rule requires that there should be a trespass in the taking before it can amount to felony; but a delivery obtained by fraud may be such as does not amount to felony, and does yet not pass the entire property to the person obtaining the delivery. Perhaps in this case the delivery of the bills to the bankrupts passed to them a qualified property, as a delivery of goods by the vendor to a carrier passes a qualified property to the vendee; yet if he become insolvent the vendor may stop them in transitu. So here, the transfer being incomplete by reason of the fraud, the condition on which the bills were parted with altogether fails, and the contract becoming a nullity ab origine, the defendant has a right to get back his bills. Therefore he might have brought trover for them, or if the bankrupts or the assignees had received the money, assumpsit would have lain against them, for they would have been holden trustees for the defendant, and as such bound to restore it. In *Harrison* v. *Walker* (*b*), where the assignees received the money under circumstances very similar to the present, it was holden that the owner of the bills might recover it from them in an action for money had and received, Lord *Kenyon* C. J. observing that the assignment under the commission passes only such property as the bankrupt is conscientiously entitled to. Now here, as between the bankrupts

(*a*) 2 *Inst.* 713. *Sir W. Jones*, 164. (*b*) *Peake's N. P. C.* 111.

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and the defendant, a court of equity would have ordered the bills to be returned, conſidering the bankrupts as truſtees for the defendant. But the aſſignees take ſubject to all equities and liens which would have attached upon the property in the hands of the bankrupts; and only take what the bankrupts are conſcientiouſly entitled to: they are, therefore, truſtees for the defendant, or rather they do not take at all; for the bankrupts had no beneficial intereſt. Neither they nor their aſſignees could have maintained any action on the bills, becauſe it might have been proved that they gave no conſideration for them; *Rees* v. *Marquis of Headfort* (*a*). But, laſtly, admitting the contract to have been binding, the parties have reſcinded it, by mutually giving up the ſecurities on each ſide; and although it is ſaid that this agreement was made in contemplation of bankruptcy, and not executed until after the bankruptcy, and therefore ſhall not prevail; it will be found that that rule applies only to caſes where the creditors are defrauded, by the agreement, as in *Barnes* v. *Freeland* (*b*); but if it be ſuch as ought in conſcience to be performed, the aſſignees will be bound to carry it into effect. With reſpect to the bank-notes, there ſeems to be no reaſon why the right to them ſhould not follow the right to the bills.

Richardſon in reply. It will be found that the principle on which the caſes of felony proceeded is general, and applies as well to caſes of contract, as to other caſes. The principle is, that if goods or money be delivered upon a contract, ſuch property paſſes to the bailee as will ſatisfy the intention of that contract; therefore if

(*a*) 2 *Campb. N. P. C.* 574. (*b*) 6 *T. R.* 80.

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delivered with the intention of receiving the identical thing back again, the poſſeſſion only is transferred; but if there be a delivery of goods on ſale, or of bills or money in payment or upon a loan outright, or upon ſecurity, the property paſſes. *Rex* v. *Parks* (*a*), *Coleman's caſe* (*b*), *Atkinſon's caſe* (*c*). *Parker* v. *Patrick* (*d*) was an expreſs deciſion that the property paſſed notwithſtanding the goods were obtained by fraud: and in *Power* v. *Wells* (*e*) it was held, that fraud in a warranty made by one party to a contract did not enable the other party to reſcind it. So here the defendant truſted to a warranty. If then the property once veſted, the aſſignees cannot be affected by any thing done afterwards by the bankrupts to deveſt it; for they were not competent to bind the aſſignees, who repreſent the creditors at large, and not merely the bankrupts, and derive their title by law through the aſſignment of the commiſſioners; and even if the bankrupt has the order and diſpoſition of property without the right at the time of his bankruptcy, no ſubſequent act of his can affect the rights of the aſſignees. In *Hartop* v. *Hoare* (*f*), the defendant was held liable for jewels pledged to him, becauſe the party pledging them had no right to bind the plaintiff, whoſe property they were. As to the right of ſtoppage in tranſitu, that is founded on an implied proviſo in every contract of ſale, that until the goods are paid for the ſeller may reſume them; but there the right muſt be exerciſed before the goods come into the hands of the vendee. With reſpect to *Harriſon* v. *Walker*, perhaps what is reported to have been ſaid by Lord *Kenyon* goes ſomewhat too far; for a

(*a*) 2 *Eaſt's P. C.* 671. (*b*) *Ib.* 672. (*c*) *Ib.* 673.
(*d*) 5 *T. R.*, 175. (*e*) *Dougl.* 24. *in not.* *S. C. Cowp.* 818.
(*f*) 1 *Wilſ.* 8. 3 *Atk.* 44. *Str.* 1187.

legal

legal title is ſufficient for aſſignees; and the caſe itſelf is not in point, becauſe there the bills did not come to hand until after the bankruptcy.

Lord ELLENBOROUGH C. J. If there had been no bankruptcy in this caſe, it is quite clear that *Sill* and *Watſon* could not have maintained any action againſt the defendant, who has only got back by conſent what one of them obtained from him by fraud. How far, the bankruptcy having intervened, the aſſignees are identified with the bankrupts, is a different queſtion. There are caſes which the Court certainly would not adopt without ſome limitation.

The caſe was reſerved for conſideration, and on this day

Lord ELLENBOROUGH C. J. delivered the judgment of the Court. After ſtating the facts of the caſe, his Lordſhip ſaid: The queſtion is, whether *Sill* and Co. had ſuch a property in the bills of exchange, &c. as paſſed to their aſſignees. We are of opinion that they had not. In this caſe bills were obtained by the bankrupt (*Sill*) under a falſe pretence of giving the defendant an ample ſecurity, by delegating to him a right to hold coffee; whereas the coffee (which was the ſecurity pretended to be given) was the property of another perſon, over which *Sill* had no control or lien, or if he had, had before pledged it in favour of another creditor. The bills therefore appear to have been obtained by a criminal fraud. It has been argued, indeed, on behalf of the aſſignees, that the property veſted in them under the commiſſion; and in ſupport of the argument it is ſup-

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posed that by analogy to cases in the criminal law, the property may be considered as having passed from the defendant to *Sill* and Co.: but if it did, it was under such circumstances as a court of equity on a bill filed would have directed the property to be restored. If that be so, we think it would be useless for a court of law to permit that to be recovered which could not be retained one moment. In *Scott* v. *Surman* (*a*), *Willes* C. J. says, "My notion is, (and that opinion is confirmed by many authorities cited by Mr. *Durnford* in a note,) that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estate of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts. And I found this opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely upon the rule concerning circuity of action. For I think it would be absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them, by which they will be obliged to refund and account, and according to the case of *Burdett* v. *Willett*, will likewise have costs decreed against them, and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to no purpose whatever."

(*a*) *Willes*, 402.

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ever." On these principles, and on the authority of the cases cited, we are of opinion that the assignees are not entitled to recover this property, which if they were to recover, a court of equity would compel them to restore, but that the defendant is entitled to retain it. A distinction has been raised in argument as to the bank-notes, and it has been urged as to them that although the assignees might have no right to the bills as long as they remained undisposed of, yet they are entitled to the proceeds when discounted; but we think that as the bank-notes were not mixed with the rest of the bankrupt's property, and are capable of being distinctly traced, they stand in the same position as the bills themselves, and therefore cannot be recovered.

Judgment for Defendant.

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Friday, May 28th.

COVENANT by the plaintiffs, as surviving partners of *Stamp Brookbank*, and *Thomas Hankey*, deceased, for non-payment of an annuity. The deed set forth on oyer, which was dated the 25th of *June* 1793, and made between one *Francis Boynton* of the first part, *Peter Acklom* and the defendant of the second part, and the plaintiffs and their deceased partners of the third part, recited deeds of lease and release of the 1st and 2d of

Where the grantor of an annuity by deed conveyed to the grantees all his estate in the interest of 10,000*l.*, in trust for himself until default in payment, and after default to retain thereout the arrears, &c., and after retaining the arrears, upon farther trust for himself: Held that a memorial, which stated that the interest of the 10,000*l.* was by the deed conveyed to the grantees *upon the trusts thereby declared*, was defective; although the grantor had not the legal estate in the interest of the 10,000*l.* at the time of his conveyance of it to the grantees, but the same was vested in trustees in trust for him after deducting certain annual payments, and the trustees did not join in conveying their interest to the grantees.

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May 1788, by which certain eſtates of *Boynton* were conveyed to *P. Acklom* and the defendant, as truſtees, to ſell and pay off two mortgages, and after payment thereof to inveſt 10,000*l.* at intereſt, and out of the intereſt to pay *Lydia*, the wife of *Boynton*, 200*l.* a-year during the joint lives of *Lydia* and *Boynton*; reciting alſo, that *Acklom* and the defendant ſold the ſaid eſtates, paid off the mortgages, and retained 10,000*l.*, and had lent out the ſum of 4000*l.* at intereſt upon mortgage, and alſo 6000*l.*, the reſidue, to the defendant upon the like ſecurity; reciting alſo, that through miſtake it was not declared in the deed of 1788 that the reſidue of the yearly intereſt of the 10,000*l.*, after payment of the 200*l.* to *Lydia*, was to be paid to *Boynton*, the ſaid *Acklom* and defendant covenanted to ſtand poſſeſſed of ſuch reſidue, (after payment of 200*l.* and a further ſum of 20*l.* agreed to be allowed to *Lydia*,) in truſt for *Boynton* during the joint lives of himſelf and wife, and to pay the ſame to him or as he ſhould direct or appoint, and in caſe he ſhould ſurvive his wife, then to pay the whole intereſt to him for his life, (after deducting an annual ſum not exceeding 260*l.* for the maintenance of children;) reciting alſo that *Boynton*, on the 22d of *February* 1793, agreed with the plaintiffs and their deceaſed partners for the ſale of an annuity of 110*l.* for his life, and on the 3d of *June* 1793 for the ſale of another annuity of 30*l.* for his life, and that it had been agreed to conſolidate the two into one annuity of 140*l.*, payable quarterly, and for that purpoſe *Boynton* had given a bond and warrant of attorney thereon to the plaintiffs and their deceaſed partners, conditioned for the payment of the ſaid annuity; the ſaid *Boynton* thereby conveyed to the plaintiffs and their deceaſed partners

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the intereſt of the two principal ſums of 6000*l.* and 4000*l.* ſecured by the ſaid mortgages, after payment thereout of ſuch yearly ſums as aforeſaid, and all the eſtate, &c. of *Boynton*, or of any perſon in truſt for him, in the intereſt of the ſaid 10,000*l.*, or any part thereof, to hold the ſame *in truſt for him until default in payment of the annuity, and after default in truſt to retain thereout the arrears and expences incurred by reaſon of the non-payment, and after retaining the ſame then upon truſt that they ſhould pay the reſidue to* Boynton, *or ſuch perſon as he ſhould appoint;* and the better to enable the plaintiffs and their deceaſed partners to recover the payment of the intereſt ſo aſſigned, *Boynton* appointed them his attornies, and in his name or their own names to ſue for, recover, and receive the ſame from *P. Acklom* and the defendant or the ſurvivor, to give receipts for the ſame, and to bring actions or ſuits in his or their name for that purpoſe: and the defendant and *P. Acklom* jointly and ſeverally covenanted with the plaintiffs and their deceaſed partners to pay out of the intereſt of the 10,000*l.* truſt monies the ſaid annuity of 140*l.* during the life of *Boynton*, &c.

There were ſeveral pleas upon which objections were raiſed and diſcuſſed in the courſe of the argument; but as the Court ultimately decided upon one alone, it is only material to ſtate ſo much of the laſt plea as gave riſe to that objection. That plea ſtated that no other than the following memorial was inrolled. It then ſet forth the memorial verbatim, which was a memorial of the bond, warrant of attorney, and indenture (25th *June* 1793,) declared upon, as to which indenture, after ſtating the parties thereto, and grant of the annuity, &c. it went on thus: "which ſaid annuity is by the ſaid indenture

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indenture farther secured by and out of the interest and annual produce of two several principal sums of 6000*l.* and 4000*l.* secured by the several mortgages in the said indenture recited and described, &c. and which interest or annual produce is and are by the said indenture assigned and conveyed unto the said plaintiffs and their deceased partners, *upon the trusts thereby declared.*" Demurrer and joinder.

Bowen in support of the demurrer, upon the objection that this memorial states the interest of the two principal sums of 6000*l.* and 4000*l.* to be conveyed to the plaintiffs upon the trusts in the indenture declared, without stating what those trusts were, admitted that since the cases of *Denn* v. *Dolman* (*a*), *Desenfans* v. *O'Bryen* (*b*), and *Defaria* v. *Sturt* (*c*), he could not contend that if trusts be created, they need not be disclosed in the memorial; but he submitted that here no trust was created, because no estate passed to the plaintiffs. *Acklom* and the defendant stood possessed of the whole of the interest on the 10,000*l.* as trustees during the life of *Boynton*, and they have not joined in assigning over any part of it to the plaintiffs. *Boynton* alone assigns to them; and executes a power of attorney to enable them to recover the interest in his name as it becomes due, which would have been perfectly nugatory if the assignment vested the interest in the plaintiffs as trustees. If this had been a leasehold estate, *Boynton* would have been the cestui que trust, and as such could have conveyed no legal interest to his assignee by this assignment. In *Denn* v. *Dolman*, *Askew* v. *Macbreth* (*d*), and the other cases, there was a good conveyance of the legal estate to

(*a*) 5 *T. R.* 641.
(*b*) 3 *East*, 559.
(*c*) 2 *Taunt.* 225.
(*d*) 1 *New. Rep.* 214.

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the truſtees, whereas here the only parties competent to aſſign did not join in the aſſignment. *Boynton*'s aſſignment could at the utmoſt only give a power to the grantees to diſtrain, but ſuch a power is not required to be ſet out (*a*) in the memorial. If the grantees are truſtees at all, they muſt be truſtees for themſelves, which is not a very uſual courſe of exerciſing truſts.

Coltman contrà. If the argument were tenable that this aſſignment by *Boynton* to the plaintiffs conveyed to them no eſtate, becauſe it was a mere truſt eſtate in *B.*, and therefore required no memorial, it would afford an eaſy mode of defeating the proviſions of the annuity act (*b*). The grantor of an annuity would have nothing to do but to convert his legal into an equitable eſtate, and then he might aſſign in truſt what portion of it he pleaſed without the neceſſity of a memorial. The ſame argument would alſo have been an anſwer to ſeveral of the objections taken to the memorial in *Bradford* v. *Burland* (*c*), becauſe there the eſtate on which the annuity was ſecured was the truſt eſtate of the wife, and it might therefore have been ſaid that no memorial was neceſſary; but it does not appear that any ſuch anſwer was attempted to be given; and in that caſe the Court were ſtrongly impreſſed with the objection, that the truſt in favor of the grantor of the annuity, until default in payment and 20 days afterwards, was not truly ſtated (*d*). Here the plaintiffs are truſtees for *B.*, as well until default in payment, as alſo after the arrears are ſatisfied.

(*a*) *Per Mansfield* C. J. *Defaria* v. *Sturt*, 2 *Taunt.* 232.
(*b*) 17 *G.* 3. *c.* 26. (*c*) 14 *Eaſt*, 445. (*d*) *Ibid.* 461.

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And these are not merely resulting trusts, but are expressly created by the deed; and though it may be said that they would have by law resulted without any such express provision, that will not make it less requisite that they should be stated in the memorial. In *Desenfans* v. *O'Bryen* (*a*), the trust was of that nature, and yet the omission was held fatal; and in *Taylor* v. *Johnson* (*b*), a memorial omitting a trust in favour of the grantor until default in payment of the annuity, was holden to be defective; and *Lawrence* J. observed, "that the memorial ought to have stated all the trusts contained in the deeds for securing the annuity; as well those which were intended for the benefit of the grantor, as those for the benefit of the grantee."

Bowen in reply, enforced his former objection to the plaintiffs being trustees, as well from the inconsistency of their being trustees for themselves, as from their being treated in every other part of the deed, except where these supposed trusts were created, as grantees only. In all the cases referred to an interest was vested in third persons as trustees for the purposes of the deed, and therefore it was holden that the memorial must disclose the trusts; but in this case no such interest is created.

LORD ELLENBOROUGH C. J. If this were res integra, I should have no difficulty in pronouncing the memorial sufficient. We have not in this case to struggle with the act of parliament, but with decisions. They are so many and so potent, that I feel it my duty to look into

(*a*) 2 *East*, 559. (*b*) 8 *T. R.* 184.

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them in order to guide myſelf through the quickſands which they have oppoſed to the attainment of juſtice in this caſe. The act of parliament is very ſpecific, and is meant for a clerk to execute, and not for an acute lawyer. It requires that the memorial ſhall contain the day and year when the deed bears date; the names of the parties, and for whom any of them are truſtees, and of the witneſſes; the annual ſum, and the name of the perſon for whoſe life the annuity is granted, and the conſideration of granting the ſame; which means expreſs conſideration. Theſe are the ſeven ſpecific requiſites of the act, which any clerk by looking into the deed may find without difficulty. But on the words "for whom any of them are truſtees" a ſyſtem has been engrafted (improperly, as it appears to me,) by a ſeries of deciſions, viz. *Taylor* v. *Johnſon*, and others. In deference to thoſe authorities we feel it neceſſary to look into them, leſt we ſhould diſarrange them, or in any inſtance in which we have adopted them, contradict ourſelves; happy if we are enabled to do juſtice to this caſe, notwithſtanding thoſe deciſions.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was a queſtion ariſing upon the memorial of an annuity deed. By that deed, *F. Boynton* having agreed for the ſale of two annuities to the plaintiffs, amounting together to 140*l.*, to be ſecured on the intereſt of two ſeveral ſums of 4000*l.* and 6000*l.* veſted in *Acklom* and the defendant as truſtees, they (the defendant and *Acklom*), as truſtees, covenanted with the plaintiffs to pay the ſaid annuity out of the intereſt of the ſaid 10,000*l.*

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Upon this covenant the action is brought againſt the defendant for non-payment of the annuity. By former deeds of 1788 certain eſtates of *Boynton* were conveyed to *Acklom* and the defendant on truſt to raiſe 10,000*l.*, inveſt the ſame at intereſt, and pay thereout 200*l.* a-year to *Lydia*, the wife of *Boynton*. The 10,000*l.* were raiſed, and laid out on two ſeveral mortgages of 4000*l.* and 6000*l.*, and Mrs. *Boynton*'s annuity was increaſed to 220*l.*; and the truſtees covenanted to ſtand poſſeſſed of the reſidue in truſt for *Boynton*. By the annuity deed they are not made grantors of the annuity, nor do they aſſign their intereſt to the plaintiffs (the grantees), but only covenant to pay the annuity; but *Boynton* conveys all his eſtate in the intereſt of the two ſeveral ſums of 6000*l.* and 4000*l.* to the plaintiffs, in truſt for himſelf until default in payment of the annuities, and in caſe of default to retain to themſelves the arrears, and after retaining the ſame upon farther truſt for his benefit. The memorial, inſtead of ſpecifying theſe truſts, only ſtates that the intereſt or annual produce is by the indenture aſſigned to the plaintiffs *upon the truſts thereby declared*. This omiſſion in the memorial is the main objection on which the defendant relies. And on conſideration we feel ourſelves conſtrained by the authorities to yield to it. The caſes of *Aſkew* v. *Mackreth*, *Deſenfans* v. *O'Bryen*, and *Bradford* v. *Burland* all decide, that if truſts be created in an annuity deed, the terms and proviſions of ſuch truſts muſt be ſet forth in the memorial. In this caſe the ſurplus intereſt of *Boynton* is aſſigned upon truſts to the plaintiffs, and there are no truſts ſpecified in the memorial. It has been argued indeed for the plaintiffs, that the aſſignment really paſſed nothing, and therefore that it was unneceſſary to memorialize

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rialize the truſts thereby created. But we think it a miſconception to ſay that it paſſed nothing, for the grantees were thereby entitled to ſue the defendant and *Acklom* in the name of *Boynton*; and where an annuity deed creates a truſt to ſecure the annuity in favour of the grantee himſelf, although it is derived through the medium of a third perſon, it is notwithſtanding a truſt. For theſe reaſons we think the memorial defective.

Judgment for the Defendant.

STEVENSON and Another, Aſſignees of COLLIS, a Bankrupt, *againſt* BLAKELOCK, Gentleman.

Friday, May 28th.

An attorney has a lien for his general balance on papers of his client which come to his hands in the courſe of his profeſſional employment; therefore where *C.* gave his attorney a ſpecific ſum for the purpoſe of ſatisfying a debt for which an execution had iſſued againſt his goods at the ſuit of *B.*, and the attorney paid the money to *B.*, who thereupon delivered to him a leaſe which had been depoſited by *C.* with *B.* as a ſecurity for the debt: Held that the attorney had a lien on it for his general balance due from *C.*; and that ſuch lien was not extinguiſhed by his having taken acceptances from *C.* for the amount of that balance before the leaſe came to his hands, ſome of thoſe acceptances when the leaſe did come to his hands having been diſhonored, and one of them taken up by the attorney.

TROVER for an indenture of leaſe; there were two counts, one upon a converſion before the bankruptcy, laying the property in the bankrupt; another laying the property in the plaintiffs as aſſignees on a converſion after the bankruptcy. Plea, general iſſue. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after *Trinity* term 1812, a verdict was found for the plaintiffs, ſubject to the opinion of the Court upon the following caſe:

For ſome time before the month of *July* 1809, the defendant had been employed by the bankrupt in various matters as his attorney and ſolicitor, and in that month, in conſequence of a requeſt from the bankrupt, made out his bill for the buſineſs ſo done, upon which a balance

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lance of 300*l.* appeared to be due to him; but neither that bill nor any other was ever delivered to the bankrupt. Upon being informed however of this balance by the defendant, the bankrupt requeſted him to draw bills upon him for the amount, and accordingly upon the 25th of *Auguſt* 1809, the defendant drew five ſeveral bills of exchange upon the bankrupt, which the bankrupt accepted, all dated on that day, and payable to the defendant's order, which bills were for the ſeveral ſums and payable at the ſeveral times following, viz.: one for 50*l.* at one month after date, due 28th *September* 1809; another for 50*l.* at ſix weeks after date, due 9th *October* 1809; another for 100*l.* at two months after date, due 28th *October* 1809; another for 50*l.* at 70 days after date, due 6th *November* 1809; and another for 50*l.* at three months after date, due 28th *November* 1809. The two firſt of theſe bills were, before they became due, indorſed and delivered by the defendant to *W.* and *S.*, to whom he was indebted in the whole amount. When they became due they were diſhonored by the bankrupt, but remained in the hands of *W.* and *S.* at the time of the bankruptcy, and were proved by them under his commiſſion. Theſe bills, however, have ſince been taken up by the defendant, who has long ago diſcharged his debt to *W.* and *S.*, and the bills are now in his hands. The third bill for 100*l.* was alſo negociated by the defendant to *C.*, to whom he was indebted, but this being likewiſe diſhonored by the bankrupt was returned to the defendant for non-payment, and was taken up by him on the 29th *October* 1809, and has ever ſince remained in his poſſeſſion. The bankrupt when he gave the bills expreſſed ſome doubt whether he ſhould be able to provide for the other two at the time when they

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they became due, and requeſted the defendant not to circulate them, and therefore the defendant never parted with them, and they ſtill remain in his hands, but they did not become due till after the bankruptcy. In *Trinity* vacation 1809, three writs of fieri facias iſſued againſt the bankrupt, one at the ſuit of *Barrow* and others, and two at the ſuit of other perſons; under which the ſheriff took poſſeſſion of the bankrupt's goods, and threatening to ſell the ſame, the bankrupt on the 31ſt *October* 1809 adviſed with the defendant about paying the debts for which the execution had iſſued, and gave him 260*l.* for the purpoſe of ſatisfying that at the ſuit of *Barrow* and others; and on the following day the defendant paid to the ſolicitors of *Barrow* and others the 260*l.* in diſcharge of their debt, and thoſe ſolicitors thereupon delivered to the defendant the leaſe in queſtion, which had been depoſited by the bankrupt with *Barrow* and others as a collateral ſecurity for their debt. Judgments on ſeveral cognovits being payable on the 6th of *November*, the bankrupt found it impoſſible to continue his buſineſs, and it was neceſſary for him to ſubmit to a commiſſion of bankruptcy, and the defendant thought it adviſable for him ſo to do. On the 2d of *November* the bankrupt committed an act of bankruptcy, and a commiſſion thereupon iſſued under which the plaintiffs have regularly been choſen aſſignees. The defendant not having before delivered his bill of coſts to the bankrupt, after the bankruptcy delivered it to the aſſignees, but his demand upon the bankrupt and the aſſignees is confined ſolely to the 300*l.* before mentioned. The bankrupt was legally intitled to the leaſe in queſtion, which is ſtill in the poſſeſſion of the defendant, and which was demanded

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of him by the plaintiffs before this action was brought, but he refuſed to deliver it.

The queſtion for the opinion of the Court is, whether under the above circumſtances the plaintiffs are entitled to recover. If the Court ſhould be of opinion that they are, then the verdict to ſtand, otherwiſe a nonſuit to be entered.

Gifford for the plaintiffs ſtated the queſtion to be, whether the defendant had a lien upon the leaſe in queſtion for any part of his demand againſt the bankrupt, for which the bankrupt accepted the bills of exchange; and contended that he had not, firſt, becauſe the leaſe did not come to his hands in the uſual courſe of his buſineſs, but as a ſpecial bailee; and ſecondly, becauſe, admitting that the lien would otherwiſe have attached, he had waived it by taking the bills; and the lien being once diſcharged, could not revive. It muſt be admitted that an attorney has a lien on all papers and deeds which come to his hands in the courſe of his profeſſional employment for the party; but then it is for the attorney to ſhew that the papers on which he claims a lien did ſo come to his hands. Now it appears that the leaſe in queſtion was received by him for the ſpecific purpoſe of being handed over to the bankrupt from *Barrow* and others, for which purpoſe the defendant was rather their agent than the agent of the bankrupt. He was bound therefore to deliver it over to the bankrupt on the behalf of *Barrow* and others, from whom he received it for that ſpecific purpoſe alone. It might have been different if he had been inſtructed by the bankrupt to demand the leaſe. Secondly, as to the waiver; the right of an attorney to detain papers for his general balance being like other liens a right which ariſes

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by implication of law, the moment a ſpecial agreement is entered into, that right ceaſes. This is ſo laid down in 2 *Roll. Abr. tit. Juſtif. pl.* 1. 2., in *Chapman* v. *Allen* (*a*), *Brenan* v. *Currint* (*b*), *Collins* v. *Ongley* (*c*), and by *Popham* C. J. in the *Innkeeper's caſe* (*d*). It may be ſaid that thoſe were all caſes of antecedent ſpecial contracts; whereas in this the ſpecial contract took place after the lien attached; but the ſame thing occurred and was much conſidered in *Cowell* v. *Simpſon* (*e*), and it was determined that the lien no longer remained: there the Lord Chancellor ſaid; "if the lien commenced under an implied contract, and afterwards a ſpecial contract is made for payment, in the nature of the thing the one contract deſtroys the other." Great inconſiſtency would follow, if it were otherwiſe. Suppoſe the day after the bankrupt had given the bills for this balance, the leaſe being then in the poſſeſſion of the defendant, the bankrupt had demanded it, could the defendant have inſiſted on detaining it unleſs he was paid the balance? How would that be conſiſtent with his agreement the day before to take ſecurities, poſtponing the payment to a future time? It may truly be ſaid, therefore, that in the nature of the thing the one contract deſtroyed the other. And this is no hardſhip on the defendant, for by obtaining the bills he got a better ſecurity, viz. by the bankrupt's diſpenſing with the taxation of his bill. There is one reſpect, however, in which *Cowell* v. *Simpſon* differs from this caſe, viz. that there the ſecurities had not failed, the time for their payment not having arrived; whereas here three of the bills were due and

(*a*) *Cro. Car.* 271. (*b*) *Say. R.* 224.
(*c*) 2 *Selwyn's N. P.* 1214. 3*d edit.* (*d*) *Yelv.* 67.
(*e*) 16 *Veſ.* 275.

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had been dishonored, and one of them was actually taken up by the defendant before the lease came to his hands; and on this distinction it may be argued, that the lien was only gone during the time the bills had to run, but on their dishonour revived; at least to the extent of the bill taken up by the defendant. But besides that the Lord Chancellor in the case cited said that it makes no difference whether the securities were due or not; such an argument will be found contrary to the whole course of decision, that a lien once gone cannot revive; and although that doctrine has been most frequently applied to cases where the lien was gone by parting with the possession, yet if by taking the security it be also gone, there seems to be no reason why the same doctrine should not also hold good in this instance.

Littledale contrà. It is immaterial as to the question of lien, for what purpose an attorney receives the papers of his client, provided he receives them in the ordinary course of his business. Here that appears to have been the case; for although it is said that he had no instructions from his client to demand the lease, yet it was his duty, as his attorney, and acting for his interest, without any express instructions to get back the security when the debt was satisfied. The client cannot be expected to instruct him in every minute particular; and it would lead to subtle and refined distinctions, if the Court were in all cases to go into the question upon what occasion particular papers were put into the attorney's hands, before they decided as to the right of lien. In *Ex parte Sterling* (*a*), the Lord Chancellor said that in

(*a*) 16 *Ves.* 259.

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the ordinary case of lien he never heard of a question of that sort; and took the rule to be whether the papers came to the attorney in the general course of dealing with his client. On the second point, some of the authorities cited are very ancient, and perhaps they lay down a rule restraining the right of lien further than the modern understanding warrants; but however that may be, they do not bear upon the present case: for in all of them the express contract was made before, here it was after the lien commenced; and the rule was laid down with reference only to the particular lien to which the express contract applied, and not to a general lien. In *Cowell* v. *Simpson* the Lord Chancellor seems to have applied this rule to a general lien; but that case is very distinguishable, for there the solicitors had not only taken securities which were then running for their balance, but had got a judgment for it, by which the nature of their debt was totally changed. But that decision is not inconsistent with the doctrine that the lien may be suspended by taking the securities, and revive upon their failure; and there is not any authority to shew that in such a case it is gone for ever. In the case of parting with the goods there is an unconditional relinquishment of the subject-matter on which the lien is to operate; but taking security amounts only to a suspension of the demand during the time that security has to run. So if a man distrain for rent arrear, and take a promissory note for it, although he cannot distrain again before the note becomes due, yet if afterwards the note be not paid, he is remitted to his original right. The Lord Chancellor, indeed, in giving judgment in *Cowell* v. *Simpson*, is reported to have said that whether the securities are due or not, it makes no

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difference; but that was an obſervation which, though entitled to all reſpect, it may be remarked the caſe did not require. As to the ſuppoſed immunity from taxation of his bill which theſe ſecurities are ſaid to have given, it is a conſequence which by no means followed the taking of them. (*a*)

Gifford in reply. It has not been ſhewn that the leaſe came to the defendant's hands in the courſe of his employment for the bankrupt; on the contrary, it appears that it was without his knowledge: but if it were otherwiſe, no caſe has been cited to impugn the authority of *Cowell* v. *Simpſon*. As to the argument, that all the old caſes apply to particular liens, whereas this is a general lien; it may be anſwered, that then they apply a fortiori to this caſe, becauſe particular liens are favoured in law, but general liens are taken ſtrictly. (*b*)

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

After ſtating the material facts of the caſe, his Lordſhip ſaid, the firſt queſtion which ariſes on this caſe is, whether the defendant had a general lien as attorney attaching on the leaſe in queſtion. Secondly, ſuppoſing ſuch general lien would otherwiſe have attached, whether it is not precluded from attaching by the ſecurities taken. The firſt impreſſion on my mind was that the general lien would not attach. The leaſe did not appear to have come into the poſſeſſion of the defendant as attorney in the ordinary courſe of buſineſs, but he

(*a*) 2 *Atk.* 29.

(*b*) 3 *Bos. & Pul.* 494. per *Heath* J. in *Houghton* v. *Matthews*.

appeared

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appeared rather a mere bailee; but on further conſideration the poſſeſſion ſeems to us to have been acquired by the defendant in the courſe of his profeſſional buſineſs. It was incident to his duty to do that for his client, which the client, if well adviſed, would have done for himſelf. It became his duty, therefore, upon diſcharging the debt due to *Barrow* and others to receive back the leaſe which was pledged as a ſecurity for that debt. On the receipt of it for his client, under theſe circumſtances, it became not only the ſubject of particular lien, but alſo, as one of the papers of his client, ſubject to the general lien. We are of opinion, therefore, that the general lien attached. Upon the ſecond queſtion, whether the lien was gone in conſequence of taking the ſecurities, the argument for the plaintiffs reſts principally on the caſe of *Cowell* v. *Simpſon*, in which caſe the ſolicitors for the defendant had taken two notes, payable with intereſt three years after date, for the amount of their demand. The Lord Chancellor obſerved, that "the ſolicitor taking a ſecurity which has three years to run, as the client may have occaſion for his papers, there is as much reaſon that the lien ſhould not accompany the ſecurity through that period, as in the inſtance of a trade; and the concluſion is equally difficult that the papers, if the client has occaſion for them, could be withheld." The Lord Chancellor afterwards delivers his opinion, that "where theſe ſpecial agreements are taken the lien does not remain." I take the general rule of law to be, that where there is an expreſs antecedent contract between the parties, a lien which grows out of an implied contract does not ariſe. But in the abſence of any expreſs contract, there may be a lien, and a right of action on an implied contract. In this caſe the attorney had a

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right of action on a quantum meruit, and a lien, which was not affected by his forbearing to sue. The right of suit and right of lien are distinct rights, both arising out of implied contracts, and both subsisting at the same time. It is unnecessary to canvass the doctrine in *Cowell* v. *Simpson*, inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment. Assuming, then, the position of the Lord Chancellor to be correct, here there is the further circumstance of the bills being dishonored; which places this defendant in his original situation as to lien. We are of opinion, therefore, that the defendant is entitled to a general lien.

Judgment of nonsuit.

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CROSSE and Others, Aſſignees of FEA and Others, Bankrupts, *againſt* SMITH, THOMPSON, and Others. (*a*)

Monday, May 31ſt.

ASSUMPSIT for money lent, money paid, money had and received, alſo for intereſt due, and upon an account ſtated; which ſeveral cauſes of action were ſtated to have ariſen with the bankrupts before their bankruptcy: and alſo for money had and received, and for intereſt due, and upon an account ſtated; which ſeveral cauſes of action were ſtated to have ariſen with the plaintiffs as aſſignees. Plea, general iſſue.

At the trial before *Thomſon* B., at the ſpring aſſizes 1811 for the county of *York*, the jury found a verdict for the plaintiffs for 3344*l.* 9*s.* 2*d.* damages, *i. e.* 3176*l.* 9*s.* 2*d.* principal money, and 168*l.* for intereſt thereon from the 12th *April* 1810 to the 4th of *May*, being the 4th day of *Eaſter* term 1811, ſubject to the opinion of this Court on the following caſe:

The plaintiffs, who are aſſignees under ſeparate commiſſions iſſued againſt *Thomas*, *Magnus* and *William Fea*, on the 2d *May* 1810, and under another commiſſion

Notice to the drawers of non-payment of a bill of exchange by ſending to their counting-houſe, during hours of buſineſs on two ſucceſſive days, knocking there, and making noiſe ſufficient to be heard by perſons within, and waiting there ſeveral minutes, the inner door of the counting-houſe being locked, is ſufficient, without leaving a notice in writing, or ſending by the poſt, though ſome of the drawers live at a ſmall diſtance from the place.

Perſons who are bankers both for the drawers and acceptor of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptor to ſtop the payment of it at the place of payment, and do ſo accordingly, are not bound to give notice of this circumſtance to the drawers, but upon non-payment of the bill may look to the drawers, notwithſtanding they have not given ſuch notice: and they are not bound to apply the money of the acceptor in their hands in diſcharge of the bill; but if the drawers become bankrupt, it will conſtitute an item in the account between them and the bankers.

It ſeems that money due for advances made by a banker to his cuſtomer upon a bond given by the cuſtomer to one of the partners, in truſt for the reſt, may be ſet off in an account current between them.

(*a*) This caſe was argued at *Serjeants' Inn*.

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tained a verdict therein, at the ſummer aſſizes 1810, for principal and intereſt due on the ſaid bill; but a commiſſion of bankrupt having iſſued againſt *Tuke* on the 17th *September* 1810, the defendants did not tax their coſts or proceed to final judgment againſt him. At the time of *Tuke's* bankruptcy the defendants were indebted to him on balance of his caſh account in the ſum of 2752*l.* 16*s.* 3*d.*; and they alſo had for his uſe Meſſrs. *Feas'* acceptances for 724*l.* 5*s.* 11*d.*, but which were previouſly due and were returned diſhonored. At the time the ſeparate commiſſions were iſſued againſt *T.*, *M.*, and *W. Fea*, the defendants claimed to be creditors on the balance of their caſh account with Meſſrs. *Fea* to the amount of 38,298*l.* 18*s.* 6*d.*, which ſum they proved under thoſe commiſſions; but the defendants at that time held bills of exchange to the amount of 47,252*l.* 18*s.* 11*d.*, including the bill for 3176*l.* 9*s.* 2*d.*, and which bills were in ſuch proof ſtated to be ſecurities in their hands for their debt. When the commiſſion iſſued againſt *J. Fea*, the defendants claimed to be creditors on the balance of their caſh account with Meſſrs. *Fea* to the amount of 21,292*l.* 11*s.* 10*d.*, their original debt of 38,298*l.* 18*s.* 6*d.* having in the interim been reduced to that ſum by monies received by them from the bills depoſited in their hands; which ſum of 21,292*l.* 11*s.* 10*d.* the defendants proved under the ſeparate commiſſion againſt *J. Fea*, and in that proof ſtated the bills then remaining in their hands as ſecurities for the ſame to amount to 29,460*l.* 16*s.* On the 11th *June* 1807 *Tuke* lodged with the defendants a joint and ſeveral bond from himſelf and three others to the defendant *Thompſon*, in the penal ſum of 2000*l.*, conditioned for payment to him, his executors, adminiſtrators, or aſſigns, of the ſum of 1000*l.*

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1000*l.*, together with lawful intereſt for the ſame, on the 11th *June* 1809. The defendants advanced *Tuke* 1000*l.* on the ſaid bond by crediting his account for that ſum. *Thompſon*'s name was made uſe of in truſt for the defendants, and the 1000*l.* advanced thereon was the proper money of the defendants. The 1000*l.* and intereſt thereon from the 5th of *January* 1810 ſtill remains due on the bond. In caſe the defendants have no right to place the above ſum of 3176*l.* 9*s.* 2*d.*, or any part thereof, to their credit in account as aforeſaid or to retain the ſame or any part thereof, the defendants would be indebted to the plaintiffs as aſſignees as aforeſaid in that ſum on the balance of accounts between the defendants and Meſſrs. *Fea* at the time of their bankruptcy.

The queſtion for the opinion of the Court is, whether the plaintiffs are entitled to recover all or any and what part of the ſaid ſum of 3176*l.* 9*s.* 2*d.* If they are entitled to recover all or any part thereof, then the verdict is to ſtand, or to be entered up accordingly: otherwiſe, a nonſuit is to be entered.

Littledale, for the plaintiffs, inſiſted, firſt, that the defendants were liable for the whole ſum for which the verdict was found, becauſe they omitted to give due notice of the diſhonor of the bill. They ought to have given the earlieſt notice poſſible, and to have informed the *Feas* of the direction they had received from the acceptor of the bill to ſtop the payment of it in the hands of the *London* bankers; but if they were not bound to do that, they ought at leaſt to have given an effectual notice of its non-payment. The circumſtance of the counting-houſe being ſhut upon two occaſions did not diſpenſe with farther exertions. They ſhould have perſevered from

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from day to day, or ſhould have left a notice in writing, or have tranſmitted one by the poſt with the uſual direction, or, as one of the *Feas* lived at the diſtance of a mile only from *Hull*, they might have ſent a meſſenger to him with notice of the diſhonor. But, 2dly, ſuppoſing the notice was ſufficient, ſtill the plaintiffs are entitled to recover to the extent of 2752*l.* 16*s.* 3*d.*, the balance due from the defendants to *Tuke* at the time of his bankruptcy; which balance, as holders of the bill accepted by him, they were bound to apply in diſcharge of the bill; and by 5 *G.* 2. *c.* 30. *ſ.* 28. to have had the account ſtated between them. That the defendants held the bill as their own, and not for the *Feas*, is clear from their having brought an action upon it againſt *Tuke*; whereas if they had conſidered the bill as belonging to the *Feas*, they ought to have returned it to them. The ſtat. 5 *G.* 2. *c.* 30. *ſ.* 28. poſitively directs that the balance of the account, and no more, ſhall be taken. It is their own fault, therefore, if they have not ſettled it in account with *Tuke*. But it may be ſaid if the plaintiffs are entitled to this balance of 2752*l.* 16*s.* 3*d.*, due from the defendants to *Tuke* at the time of his bankruptcy, that, on the other hand, the defendants ought to have the benefit of deducting the 1000*l.* due to them from *Tuke* on his bond; and if that claim depended upon priority of time, the bond having become due before the claim of the plaintiffs accrued, the defendants might be entitled. But there is an objection to their ſetting it off at all, becauſe the bond is to *Thompſon* alone; and though it be in truſt for the reſt, ſtill they have but an equitable right, whereas the claim of the plaintiffs is a legal one,

Holroyd,

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Holroyd contra, upon the point of notice, contended that the counting-houſe was the proper place of addreſs, and that the defendants had done all that the law requires for the purpoſe of giving notice; *Goldſmith* v. *Bland* (*a*). There is no authority to ſhew that they were bound either to write a letter or to leave a written notice: it is ſufficient if the party goes at the uſual hours of buſineſs to the houſe of buſineſs. According to *Marius* (*b*), "if a bill of exchange be drawn upon a man living at one place, payable to a man living at another place, and the money is not to be paid in the city or town where the party on whom the bill is drawn does dwell, but in ſome other city or town where the party to whom the bill is payable does live, when the bill falls due it is not neceſſary to ſeek further for payment than at the houſe or in the place where the bill is made payable." So here it was not neceſſary to ſeek further for the purpoſe of giving notice, than at the counting-houſe of the party who drew the bill, and it was their neglect that nobody was at the counting houſe to receive it. With reſpect to the neceſſity of giving notice of the direction they had received from the acceptor to ſtop the payment of the bill, it would be ſtrange, if ſuch an obligation ſhould be found to exiſt without one trace of it appearing in the books, or even a ſingle dictum to that effect. The ſtoppage of the bill in the hands of *Smith, Payne* and Co. was not an act of the defendants, who were merely the channel through which the direction of the acceptor was conveyed, and were bound to convey it; they cannot therefore be conſidered as having by their act prevented the payment; and as to their knowledge beforehand that

(*a*) *Barnes'* edition of *Bayley on Bills*, 127. (*b*) *Marius*, ed. 1670. p. 106.

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it would not be paid, it might as well be ſaid if ſome perſon had come by the order of *Tuke* to acquaint them that the bill would not be paid, that they would have been bound to give notice. As to the claim of the plaintiffs to ſet the debt due from the defendants to *Tuke* at the time of his bankruptcy againſt this bill, the anſwer is, that whether they took it as their own bill or as the bill of the *Feas*, for which they gave credit as caſh, they had equally a right to debit the *Feas* with the amount upon the failure of the acceptor, the bill being drawn and indorſed by them; and the *Feas* alſo becoming bankrupts before *Tuke*, the ſtatute interpoſed at that time to ſtate the account between them; and therefore there was no debt in reſpect of this bill exiſting between *Tuke* and the defendants at the time when he became bankrupt. But ſuppoſing there was, ſtill the defendants were not bound under the circumſtances to ſet their debt againſt it. At all events they are entitled to deduct the debt due from *Tuke* on the bond, which, according to *Bottomley* v. *Brooke*, *Rudge* v. *Birch*, and *Webſter* v. *Scales* (*a*), muſt be conſidered as the bond of the defendants, though given to *Thompſon* alone; and the words of the ſtatute "mutual credit and mutual debt," are certainly large enough to embrace it.

Littledale, in reply, maintained that the defendants by complying with the direction of *Tuke* to ſtop the payment of the bill, had made themſelves parties to its diſhonor, and had been guilty of a breach of their duty to the *Feas*, for whom they were bound to take every ſtep to further and not to prevent payment; and he likewiſe

(*a*) Cited in *Winch* v. *Keeley*, 1 *T. R.* 621, 2.

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repeated the neceſſity of the defendants' giving notice to the *Feas* of that circumſtance. As to the citation from *Marius*, it applies only to a preſentment for payment; but it is quite another queſtion whether the ſame ſort of act, which might be good as a preſentment againſt the acceptor, who is bound to know when the bill will be preſented and to be ready to pay it, is ſufficient as notice to the drawer, who is not bound to know when notice will be given.

The caſe was reſerved for conſideration, and

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This caſe was argued at *Serjeants'-Inn*. The point upon which doubt was entertained was, whether ſufficient notice was given by the defendants before the bankruptcy of the diſhonor of the bill. The bill, which was dated the 9th of *Auguſt* 1809, for 3176*l.* 9*s.* 2*d.* at eight months after date, payable to the bankrupts' own order, and was accepted by *Tuke*, payable at *Smith*, *Payne* and Co. *London*, with the three days' grace, became due on the 12th *April* 1810. On the next day it was returned with a proteſt to the defendants at *Hull*, who received it on *Sunday* the 15th of *April*. On the *Monday* between 10 and 11 in the morning the defendants' caſhier took it to the counting-houſe of Meſſrs. *Feas* to give notice, knocked at the door, and found nobody there. After waiting a few minutes he returned to the defendants' counting-houſe. On his return he ſaw the bankrupts' attorney, and told him what he had done. On *Tueſday* about the ſame time he went again to the counting-houſe without effect; on his return ſaw the bankrupts' attorney, and again informed him of what he had done; the defendants' caſhier alſo ſaw one of *Feas'*

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clerks on the *Monday* morning; but the caſhier had not received at that time any orders to take the bill to the counting-houſe. Theſe are the facts on which the notice of diſhonor reſts, with this additional circumſtance, that one of the bankrupts was reſident about 10 miles and the other about one mile from *Hull*; but that we think immaterial, becauſe the counting-houſe was the proper place where notice was to be given; neither do we think it material that the defendants' caſhier ſaw the bankrupts' clerk on the *Monday* morning, without communicating any thing to him; nor, on the other hand, does it ſtrike us as helping this notice of the diſhonor that the defendants' caſhier informed the *Feas'* attorney of what he had done; becauſe the attorney was not the proper perſon to give ſuch notice to. That brings it to the queſtion whether ſending the bill by a clerk after 10 o'clock, and knocking and waiting at the counting-houſe door was ſufficient notice in point of law; and we think that it was. The period from 10 to 11 was a time during which a merchant's counting-houſe ought to be open, and ſome perſon expected to be met with there. The counting-houſe is a place where all appointments reſpecting the joint buſineſs, and all notices ſhould be addreſſed, and it is the duty of the merchant to take care that a proper perſon be in attendance. It has, however, been argued that notice in writing left at the counting-houſe, or put into the poſt, was neceſſary; but the law does not require it, and with whom was it to be left? Putting a letter in the poſt is only one mode of giving notice, but where both parties are reſiding in the ſame post town, ſending a clerk is a more regular and leſs exceptionable mode. The caſe of *Goldſmith* v. *Bland* before Lord *Elden*, ſupports this doctrine. The only notice of the diſhonor of

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of the bill was by a clerk of the indorſee, who went to the counting-houſe of the indorſer, found the counting-houſe ſhut up and no perſon there; ſaw a ſervant girl, who ſaid nobody was in the way, and he then returned without leaving any meſſage. Lord *Eldon* told the jury that if they thought the indorſer was bound to have ſomebody there, the notice was regular. The jury were ſatisfied that the hour was a proper hour, and that the defendant ought to have had a clerk there. So by a recent deciſion in this court, in *Howe* v. *Bowes* (*a*), we have held that if the makers of notes ſhut up and abandon their ſhop, it is ſubſtantially a refuſal by them to pay. Another point made in this caſe was, that the defendants in conſequence of being employed by *Tuke* had given directions to *Smith, Payne* and Co. not to pay the bill; and on this ground it was contended that the defendants could not charge the *Feas* by reaſon of the default of the acceptor, when they themſelves by their notice to *Smith, Payne* and Co. were the cauſe of the non-payment of the bill; and that at all events the defendants ought to have given notice of this circumſtance to the *Feas* their cuſtomers. But one part of that poſition, viz. that the defendants were the cauſe of the bill's not being paid, is not correct; for *Tuke* and not the defendants was the cauſe of the bill's not being paid. The defendants were no more the occaſion of its not being paid, than the clerk or poſtman would be, who carried the directions of *Tuke*. They were the bankers of *Tuke* as well as the *Feas*, and as ſuch were bound to follow his directions. As to the farther objection, that it was the duty of the defendants to give notice to the *Feas* of

(*a*) 16 *Eaſt*, 112.

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these directions of *Tuke*; we think it was not: they acted confidentially, and were not at liberty to communicate the orders of *Tuke* without betraying their trust; besides, *Tuke* might have provided for the bill elsewhere. We therefore think this point also is in favour of the defendants. Then it is said that the defendants were bound to apply so much of the money of *Tuke* in their hands as would satisfy this bill; but to this it was answered, and we think rightly, that the *Feas* becoming bankrupt the defendants had a right to set off the amount of this bill in taking the balance between themselves and the *Feas*; and that the bill did not constitute an item in the account of the defendants with *Tuke* when he became bankrupt. The last point made, was that the defendants could not have applied the 1000*l.* advanced by them to *Tuke* in reduction of their balance due to him. The argument turns on the question whether the money secured by the bond was owing by *Tuke* to the defendants. The bond was executed by *Tuke* with three other persons, to one of the defendants in trust for the rest, as a security for 1000*l.* advanced by them by crediting him to that amount. Upon this statement can there be any doubt that the money advanced was due to the defendants? In every view of this case therefore we are of opinion that the plaintiffs ought not to recover.

Judgment of nonsuit.

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M'IVER and Another *againſt* RICHARDSON.

Monday, May 31ſt.

ASSUMPSIT on a contract by the defendant to guaranty the plaintiffs, together with the money counts. At the trial before *Bayley* J., at the laſt ſummer aſſizes at *Lancaſter*, a verdict was found for the plaintiffs for 3695*l.* 13*s.* 3*d.*, ſubject to the opinion of this Court on a caſe, which ſtated in ſubſtance as follows:

The plaintiffs and the defendant are merchants at *Liverpool*. Meſſrs. *Williams* and *Wilſon*, of *Liverpool*, having contracted with *David Anderſon* and Co., at *Quebec*, for the building by them of a veſſel in *Canada*, and having given orders to different tradeſmen in *Liverpool* for ſupplying her with rigging and ſtores, part of which was ſent out to *Quebec*, afterwards failed; and their aſſignees came to an arrangement with the tradeſmen, under which the plaintiffs were appointed agents for the tradeſmen, to take upon themſelves the ſole management and diſpoſal of the goods, and were put into poſſeſſion of them by the aſſignees at *Quebec*. The whole amount of the goods furniſhed was 3695*l.* 13*s.* 3*d.*, of which the plaintiffs themſelves had furniſhed to the amount of 2091*l.* 11*s.* 7*d.* About the ſame time *Anderſon* and Co. agreed with the aſſignees to take the ſhip on their own account, and applied to the plaintiffs to contract for the rigging, ſtores, &c., and upon the plaintiffs declining to act upon their credit alone, applied to the defendant, and obtained from him a paper, of which the following is a copy:

" Meſſrs. *M'Iver* and Co.

" Gentlemen, As I underſtand Meſſrs. *David Anderſon* and Co., of *Quebec*, have given you an order for

A paper writing was given by the defendant to *A.* (to whoſe houſe the plaintiffs had declined to furniſh goods on their credit alone) to this effect: " I underſtand *A.* and Co. have given you an order for rigging, &c., I can aſſure you, from what I know of *A.*'s honor and probity, you will be perfectly ſafe in crediting them to that amount; *indeed I have no objection to guaranty you againſt any loſs from giving them this credit;*" which paper was handed over by *A.* to the plaintiffs, together with a guarantie from another houſe, which they required in addition, and the goods were thereupon furniſhed: Held that the paper did not amount to a guarantie, there being no notice given by the plaintiffs to the defendant that they accepted it as ſuch, or any conſent of the defendant that it ſhould be a concluſive guarantie.

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D. F. Jones, for the plaintiffs, contended, that the paper writing obtained from the defendant of the 12th of *March* 1811 was a perfect inſtrument of guarantie, on which an action was maintainable. There is no technical form of words peculiar to a guarantie, which is a mercantile inſtrument, and, like other mercantile inſtruments, is to be conſtrued according to the intention of the parties, and not to be ſubjected to any nice verbal criticiſm. Applying this rule to the language of this inſtrument, the inſtrument is ſufficiently plain and indicative of the parties' intent; but if there be any ambiguity on the face of it, the words are to be taken as ſtrongly againſt the party giving the guarantie as the ſenſe will admit of. So is the language of the Court in *Maſon* v. *Pritchard* (a). That the plaintiffs (the party receiving it) underſtood the paper at the time as amounting to a perfect guarantie, is clear from their having furniſhed the goods, partly upon that ſecurity: and that *Anderſon* and Co. (the party in whoſe favour it was given) did ſo, there can be no doubt, for they offered it to the plaintiffs eo nomine as a guarantie. Why then ſhould the defendant be ſuppoſed the only perſon who underſtood it otherwiſe? But it will be objected, that ſuppoſing this amounts to a guarantie, ſtill the defendant is not bound by it, becauſe he had no notice from the plaintiffs that they were content to take it as ſuch; but the law does not require a notice of that ſort; if it did, then it would be neceſſary to aver it ſpecially in declarations upon guaranties; but for that no precedent will be found. The liability therefore of the defendant attached by executing the order for delivery of the goods to *Anderſon* and Co., according to

(a) 12 *Eaſt*, 227.

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Oxley v. *Young* (*a*); and was consummated by their failure. Nor was the guarantie discharged by any delay or laches of the plaintiffs, or by the acceptance of a second security. As to delay or laches, the plaintiffs gave the order for delivery of the goods at the same time that they drew on *Anderson* and Co. for the amount, and when the bills were dishonored they gave notice of the dishonor to the defendant, which was more than they were bound to do. As to the taking a second security, it was intended only as a farther security, and not as superseding the former; which is plain from the letters of the 14th of *March* and 13th of *April*, offering both as subsisting guaranties. It is true that the plaintiffs were not at liberty to deal with *Anderson* and Co. to the prejudice of the defendant, their surety; and if it could be shewn that their taking a double security had that effect, it might operate, according to what was laid down in *Gould* v. *Robson* (*b*), in discharge of the defendant. But the second security, so far from being prejudicial, was calculated to have the contrary effect; for in equity co-sureties are liable for contribution, though they become sureties at different times and by different instruments, *Deering* v. *Earl of Winchelsea* (*c*), and *Ware* v. *Horwood* (*d*); and therefore the defendant got an advantage by it which he had not before.

Brougham, contrà, insisted that the paper given by the defendant did not of itself import a guarantie, and that there was nothing extrinsic to supply that defect; in which view the absence of any notice on the part of the plaintiffs that they accepted it as a guarantie was meant

(*a*) 2 *H. Bl.* 613.
(*b*) 8 *East*, 580.
(*c*) 2 *Bos. & Pull.* 270.
(*d*) 14 *Ves.* 28.

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to be urged, and not as a want of compliance with a rule of law, that notice muſt be given in all caſes. But in this caſe the paper writing, in its fair conſtruction, imports nothing more than an aſſurance of the degree of confidence which the defendant entertained of *Anderſon*'s honor and integrity, and at the utmoſt amounts only to a tender of a guarantie, which has never been accepted. What, therefore, might have been made concluſive by a notice, now remains equivocal and cannot bind. In *Onley* v. *Young* it will be found that notice of the acceptance of the guarantie was given to the defendant, for the plaintiff returned an anſwer to his letter, ſtating that in conſequence thereof he propoſed putting the order for the goods in hand; and that was the point fixed by *Eyre* C. J. when the guarantie attached. As to any expreſſions uſed in the letters written by *Anderſon* to the plaintiffs, they cannot have the effect of making that a guarantie which was not ſo before. He then contended that at all events the plaintiffs could only recover to the extent of 2091*l.* 11*s.* 7*d.*, the amount of the goods furniſhed to *Anderſon* by the plaintiffs themſelves, as the guarantie (ſuppoſing it amounted to one) was perſonal to the plaintiffs, and could not embrace goods furniſhed by them on account of others. But the Court ſeemed inclined againſt him on this point, particularly as the paper itſelf mentioned goods to the amount of about 4000*l.*; and in the reſult this point became immaterial.

D. F. Jones, in reply, admitted that the queſtion was reduced to one point, viz. whether the paper of itſelf amounted to a guarantie; as to which he urged the inconvenience of putting too ſtrict a conſtruction on inſtruments

ſtruments of this ſort; and relied, as before, on the rule laid down in *Maſon* v. *Pritchard*. 1813.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action againſt the defendant as guarantee of *D. Anderſon* and Co. for goods which the plaintiffs were about to ſupply to them, but heſitated ſo doing upon their credit alone; on which the defendant gave them the paper in queſtion. Under what repreſentation the defendant was induced to ſign that paper we know not. The queſtion mainly for our conſideration was, whether the paper imports to be a perfect and concluſive guarantie, or only a propoſition tending to a guarantie. And in the latter point of view the Court conſider it. The paper was to this effect. (His Lordſhip then read the paper.) We do not know on what kind of previous application the defendant ſigned it, nor is there any ſubſequent circumſtance ſtated in the caſe from which it can be collected. The paper therefore muſt be conſtrued according to the plain natural import of its terms. The import is, that the party ſigning it underſtood that *Anderſon* and Co. had given an order for goods amounting to about 4000*l.*; that this order remained unexecuted; and then, as if a queſtion had been put to the defendant reſpecting the honour and probity of *Anderſon* and Co., the defendant ſays; I can aſſure you from what I know of *Anderſon*, you will be perfectly ſafe in crediting them to that amount; and then he adds, indeed I have no objection to guaranty you againſt any loſs from giving them this credit: which words import, that if application were made he would guaranty; but no ſuch ſubſequent application was made,

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made, indeed it appears that a guarantie was obtained from another houſe. A conſiderable period elapſed, and it was not made known to the defendant until the failure of *Anderſon* and Co. that his paper had ever been communicated to the plaintiffs. Conſidering this as a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was ſo regarded, and meant to be accepted, or that there ſhould have been a ſubſequent conſent on his part to convert it into a concluſive guarantie. Under theſe circumſtances, therefore, we think there muſt be

Judgment of nonſuit.

MEMORANDA.

BEFORE the commencement of this term, viz. on the 10th of *April*, Sir *Thomas Plumer*, His Majeſty's Attorney-General, was appointed to the office of Vice-Chancellor of *England*, an office newly created by ſtat. 53 *Geo.* 3. *c.* 24.

And on the 4th of *May*, Sir *William Garrow*, the Solicitor-General, was appointed Attorney-General, and *Robert Dallas* Eſq., one of His Majeſty's learned counſel, having reſigned the office of Chief Juſtice of *Cheſter*, was appointed His Majeſty's Solicitor-General, and knighted. At the ſame time *Richard Richards* Eſq., one of His Majeſty's learned counſel, was appointed Chief Juſtice of *Cheſter*.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-third Year of the Reign of GEORGE III.

1813.

MEMORANDUM.

IN the laſt vacation Sir *Naſh Groſe*, Knt. reſigned his ſeat on the Bench of this Court, and in the early part of this term, viz. on *Wedneſday* the 23d of *June*, *Henry Dampier* Eſq. was called Serjeant, and gave rings with the motto, "Conſulta patrum," and was appointed to ſucceed Sir *Naſh Groſe*, and took his ſeat on the Bench on *Friday* the 25th, and was knighted.

At the end of this term *John Copley* Eſq. was called Serjeant, and gave rings with the motto, "Studiis vigilare ſeveris."

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Friday, June 18th.

HOLLAND *against* COOKE.

The defendant in a country cauſe is entitled to eight day's notice to plead, although he has appeared and is reſident about two miles from *London*.

ON the laſt day of the laſt term *Merryat* ſhewed cauſe againſt a rule for ſetting aſide an interlocutory judgment and ſubſequent proceedings for irregularity. Interlocutory judgment was ſigned for want of a plea; the action was a local action, and laid in *Surry*; the defendant appeared, and the declaration was delivered, with a notice to plead within four days, the defendant being reſident at *Walworth*, about two miles from *London*; and the queſtion was whether he was not entitled to an eight day's notice. It was contended that the rule which required an eight day's notice did not apply to this caſe, where the defendant was reſident only two miles from *London*, and had appeared; the rule only applying to caſes where an appearance is entered according to the ſtatute. The general rule to plead is a four-day rule.

Eſpinaſſe contrà, referred to the rule in *Tidd's Practice*. (*a*)

The Court adjourned it in order to look into the practice, and afterwards made the

Rule abſolute.

(*a*) P. 357., 5th edit.

HAGEDORN *againſt* REID.

Saturday, June 19th.

A licence to *J. H.* of *London*, merchant, on behalf of himſelf and other *Britiſh* or neutral merchants, to import a cargo from certain limits, within which an enemy's port is ſituate, in any veſſel bearing any flag except the *French*, will protect a ſhip trading from that port, in which ſhip *J. H.* and an alien enemy are jointly intereſted; and therefore ſuch intereſt was held inſurable.

ACTION on a policy of aſſurance upon the ſhip *Fieſco*, at and from *Gluckſtadt* and any port in the *Elbe* to any port in the United Kingdom. The declaration averred the intereſt to be in the plaintiff, one *Frederic Hagedorn*, and one *F. J. Schroeder*, in ſome counts ſeparately, and in another jointly. Loſs by capture. At the trial before Lord *Ellenborough* C. J. at the *Middleſex* ſittings after laſt term, it appeared that at the time when the plaintiff effected the policy he was a merchant reſident in *London*, his brother *F. Hagedorn*, at *Hamburgh*, and *Schroeder* was domiciled at *Gluckſtadt*, a *Daniſh* port, then in hoſtility with this country. The plaintiff and his brother were intereſted in one moiety of the ſhip, and *Schroeder* in the other, and the plaintiff had already received upon the policy a ſum ſufficient to cover the intereſt of himſelf and his brother. The ſhip ſailed from *Gluckſtadt* under a licence granted to *J. P. Hagedorn* (the plaintiff) of *London*, merchant, on behalf of himſelf and other *Britiſh* or neutral merchants, to import a cargo from certain ſpecified limits, within which *Gluckſtadt* was, in any veſſel bearing any flag except the *French*. The plaintiff recovered a verdict for the amount of the defendant's ſubſcription.

Topping moved to enter a nonſuit, on the ground that a joint inſurable intereſt could not ſubſiſt between a *Britiſh* ſubject and an alien enemy; for as the latter could not have any property which could be protected by a ſubſtantive ſeparate inſurance, ſo the former by uniting

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HAGEDORN *against* REID.

it with his intereſt ſhall not be permitted to effect indirectly what cannot be done directly; and he cited *M'Connell* v. *Hector* (*a*), and ſaid that there was not any caſe which authorized a *Britiſh* ſubject to trade jointly with an alien enemy. And as to the licence he contended that it did not extend to cover the preſent intereſt, being in terms expreſsly reſtrained to a *Britiſh* or neutral intereſt.

Lord ELLENBOROUGH C. J. The caſe reſolves itſelf into a queſtion upon the licence, for there is no doubt that this intereſt would not be protected by the policy without the licence. I entertained an opinion at the trial that this licence was intended to legalize a commerce beneficial to this country, and that in furtherance of that object the only reſtraint it impoſed as to the ſhip, was that it ſhould not bear the *French* flag; it is expreſsly, "in any veſſel bearing any flag except the *French*." The conſequence of ſuch a licence is to make the intereſt in the trade licenſed inſurable.

LE BLANC J. The object of the licence was to protect a trade in every ſhip except one bearing the *French* flag; it would be nugatory if it were otherwiſe.

BAYLEY J. The true conſtruction is that they might import a cargo in any but a *French* ſhip.

Rule refuſed. (*b*)

(*a*) 3 *Boſ. & Pull.* 113. (*b*) See 4 *Taun.* 4. *Feiſe* v. *Bell.*

1813.

The BRISTOL and TAUNTON Canal Navigation Company *againſt* AMOS.

Saturday, June 19th.

DEBT againſt the defendant as one of the proprietors of the *Briſtol* and *Taunton* navigation, to recover 270*l.*, in reſpect of 27 ſhares in the ſaid navigation, for a call made the 1ſt of *July* 1811, at the rate of 10*l.* for each ſhare. At the trial before Lord *Ellenborough* C. J. at the *Middleſex* ſittings after *Hilary* term, it appeared that the company were incorporated by 51 *G.* 3. *c.* 60. (local act). (*a*) The defendant's name appeared in the act, in the

By the 51 *G.* 3. *c.* 60. (local act) the regiſter book of the *Briſtol* Canal Company is evidence, in an action brought by them for calls, of the defendant's being proprietor of the number of ſhares affixed t his name.

(*a*) The 76th ſection enacts, That for the better ſecuring to the ſeveral ſubſcribers their reſpective ſhares therein, the ſaid company of proprietors, or their committee of management, ſhall, as ſoon as the ſame can or may be done, cauſe the names and additions of the ſeveral perſons, who ſhall be entitled to any ſhare or ſhares in the ſaid undertaking, and the number of ſhares to which they ſhall be reſpectively entitled, and alſo the proper number, by which every ſuch ſhare ſhall be diſtinguiſhed, to be fairly and diſtinctly entered in a book, to be kept by the principal clerk to the ſaid company of proprietors, and after ſuch entry, cauſe the common ſeal of the ſaid company of proprietors to be affixed thereto, and ſhall alſo cauſe as many tickets or inſtruments to be prepared as there ſhall be ſhares in the ſaid undertaking, bearing reſpectively the ſame numbers as in the book, and the common ſeal of the ſaid company of proprietors to be affixed to each ſuch ticket or inſtrument, and thereupon cauſe to be delivered to every ſubſcriber towards the ſaid undertaking, upon demand, a ticket or tickets, ſpecifying the ſhares to which he or ſhe is entitled in the ſaid undertaking, ſuch ſubſcriber paying to the clerk to the ſaid company two ſhillings and ſixpence, and no more, for every ſuch ticket or inſtrument, and ſuch ticket or inſtrument ſhall be admitted in all courts whatever, as evidence of the title of ſuch ſubſcriber, his or her executors, adminiſtrators, and aſſigns, to the ſhares therein ſpecified; but the want of any ſuch ticket or inſtrument ſhall not hinder or prevent the owner of any ſhares from ſelling or diſpoſing thereof, or from receiving annually his or her ſhare of the profit of the ſaid navigation in reſpect thereof.

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the liſt of original proprietors. His name alſo appeared upon the regiſter book of the company, as proprietor of 27 ſhares; which book was made up by the treaſurer, and the corporation ſeal was affixed to it, as required by the act, on the 31ſt *Dec.* 1811; but the original paper ſubſcribed by the defendant himſelf, which was dated in *April* 1810, not being ſtamped, was not admitted in evidence. His Lordſhip was of opinion that the defendant's name appearing in the act was proof that he was a proprietor of one ſhare, but he doubted whether there was evidence of his being a proprietor of more than one. A verdict therefore was taken for 10*l.*, with leave to move to enter it for 270*l.*, for which purpoſe a rule was obtained in the laſt term. Upon the rule afterwards coming on in the ſame term, the Court expreſſed a wiſh to ſee the regiſter book, and the caſe ſtood over until this day, when the book was produced, and appeared to contain nothing more than the names of the proprietors,

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Section 100. after providing a general form of declaration to be uſed by the company in any action to be brought by them for calls againſt the owners of ſhares in the ſaid canal, enacts, That on the trial of any ſuch action, it ſhall only be neceſſary to prove that the defendant or defendants, at the time of making ſuch call or calls, was or were a proprietor or proprietors of ſuch ſhare or ſhares in the ſaid canal, and that ſuch call or calls was or were in fact made, and that ſuch notice thereof was given as hereinbefore directed, *and the production by the principal clerk or other officer of the ſaid company of the ſaid regiſter book*, and of the minutes of the proceedings of the committee of management, and of the newſpapers in which notice of the ſaid calls ſhall have been or ſhall be advertiſed, ſhall be ſufficient evidence in ſupport of ſuch action or actions, without proving the appointment of the committee, who made ſuch call or calls, or any other matter whatſoever, and the ſaid company of proprietors ſhall thereupon be entitled to recover what ſhall appear due, unleſs it ſhall appear that any ſuch call was made contrary to the directions and reſtrictions in point of time or amount contained in this act.

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and the number of ſhares belonging to each, affixed to each name.

Topping, *Marryat*, and *Pollock* ſhewed cauſe, and contended that the defendant was only liable, as being a proprietor named in the act of parliament, in reſpect of one ſhare. The act never meant to make the regiſter book concluſive evidence againſt every perſon whoſe name was inſerted in it to the extent of any number of ſhares. The 76th ſection directs a ticket ſealed with the corporation ſeal to be delivered to each of the ſubſcribers, and that ſuch ticket ſhall be evidence of his title; if therefore a ticket was made out and delivered to the defendant, that would have been the proper evidence; if not, it was the fault of the company that none ſuch was made. The 100th ſection does not diſpenſe with the neceſſary proof of the party's being proprietor of the number of ſhares for which he is charged; on the contrary it requires, that the company at the trial ſhall prove that the defendant, at the time of making the call, was a proprietor of ſuch ſhare or ſhares, and that ſuch call was in fact made, and that notice thereof was given. It goes on indeed to provide that the production of the regiſter book, together with other documents, ſhall be ſufficient, without proving the appointment of the committee who made the calls; the regiſter book is therefore to a certain extent evidence, but not to the whole extent contended for; if it were, it would be charging one party concluſively with an act done without his aſſent by another party; for the book is made up by the committee in the abſence of the perſon to be charged, and if it be evidence at all, it is concluſive evidence, inaſmuch as the act goes on to provide that the company ſhall thereupon be entitled to recover, un-

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leſs it appear that the call was made contrary to the act. Such a conſtruction however would be introductory of a novel rule of evidence; and there is beſides this peculiar objection to its admiſſibility in the preſent caſe, viz. that the book purports to have been made up nearly five months after the call, and therefore cannot be deemed evidence of the defendant's being a proprietor at the time when the call was made, unleſs it can be ſhewn to have a retroſpective operation.

The Attorney-General, *Abbott*, and *W. P. Taunton*, contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. It is clear on referring to the act, that the regiſter book is to be admitted as evidence of the defendant's property in theſe ſhares; and from an inſpection of the book it appears that he held them as original ſhares, for upon every transfer of a ſhare a memorial of ſuch transfer is to be entered by the clerk to the company, and muſt appear on the book, and after a call is made no ſhare can be transferred until the money called for in reſpect of the ſhare ſhall be paid.

LE BLANC J. As the regiſter book contains only the entries of the names of the ſubſcribers, and the different ſhares annexed to each, and not any of the proceedings of the committee, it could only be with one object that the legiſlature directed it to be produced, namely, for that of proving the names and the number of ſhares.

Per Curiam, Rule abſolute.

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Where the maſter of the plaintiffs' ſhip entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the houſe of *M.* and Co. for the delivery of goods upon a ſtipulated freight, and the goods were delivered to *M.* and Co., who were the conſignees named in the bill of lading: Held that the plaintiffs could not maintain *aſſumpſit* againſt the defendant for the freight.

ASSUMPSIT for freight. The declaration ſtated that the plaintiffs were the owners of a veſſel, called the *Suſanna*, whereof *C. Janſſen* was maſter, and that *C. J.* as agent for the plaintiffs, cauſed to be made a charter-party of affreightment under ſeal, (of which they made a profert), purporting to be made between *C. J.* as maſter of the ſaid ſhip of the one part, and the defendant of the other part. It then proceeded to ſtate the terms of the charter-party by way of inducement, which were for the delivery of goods, at certain ſtipulated freight, at *Pillau*; and after averring a delivery of the goods at *Pillau*, according to the bills of lading, concluded thus: "And thereupon in conſideration of the premiſes and of ſuch delivery of the goods, the defendant undertook to pay to the plaintiffs the freight due for the ſaid cargo and voyage." 2d count, Indebitatus aſſumpſit for freight. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after *Hilary* term, it was proved that the plaintiffs were the owners of the veſſel, and that the defendant, who was of the houſe of *Muller* and Co. at *Konigsberg*, had entered into this charter-party, and that the goods were delivered as alleged in the declaration to *Muller* and Co., who were the conſignees in the bill of lading. His Lordſhip, however, was of opinion that the action ſhould have been brought on the charter-party; but he permitted the plaintiffs to take a verdict, with liberty to the defendant to move to enter a nonſuit.

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In *Easter* term *Scarlett* accordingly obtained a rule nisi for that purpose, on the ground that the freight having been stipulated for by deed was not recoverable in assumpsit; and he mentioned *Richardson* v. *Hanson*, *N. P. Guildhall*, 46 *G.* 3. where it had been so ruled.

The Attorney-General and *Taddy* shewed cause, and denied that the rule, as to an implied promise being merged in a specialty, was applicable to any other cases than those where the implied promise and the specialty were between the same parties. Now here the parties are not the same; for the plaintiffs are not parties to the charter-party, nor are they named in it; neither is it binding on them; for the master could not bind them by an instrument under seal without an authority under seal for that purpose; which it does not appear that he had. It was therefore a mere personal contract between the master and the defendant. But admitting that the plaintiffs may be considered as parties to the instrument, still the rule will not apply, because the defendant in this action being one of the persons composing the firm of *Muller* and Company, and not having pleaded in abatement that all the partners ought to have been joined, this action, according to *Rice* v. *Shute* (*a*), must be taken to be an action against all the partners; and if so, then the parties to the instrument and to this action are not the same, because only one of the defendants was a party to the charter-party; for one partner cannot bind the other partners by deed (*b*). The question then is, whether on account of a deed which has been executed between the master of the plaintiffs' vessel and one of the

(*a*) 5 *Burr.* 2611. (*b*) *Harrison* v. *Jackson*, 7 *Term Rep.* 207.

partners

partners in a mercantile houſe, the plaintiffs are precluded from having their action againſt all the partners of that houſe upon an implied promiſe for freight ariſing out of the acceptance of the goods under the bill of lading. They then referred to *Anon.*, 1 *Leon.* 293., and *White* v. *Parkin* (*a*), in order to ſhew that notwithſtanding the exiſtence of a deed aſſumpſit will lie.

Lord ELLENBOROUGH C. J. If a bond were given to a truſtee, it could hardly be contended that an action of aſſumpſit might be maintained by the ceſtui que truſt for the recovery of the money ſecured by the bond. The caſe has been argued ingeniouſly; but it is quite clear that this action cannot be ſupported. A contract under ſeal is entered into by the captain on behalf of the plaintiffs with one of the partners in the houſe of *Muller* and Company; after which the plaintiffs chuſe to bring an action of aſſumpſit againſt that very partner for the identical thing already contracted for with their own captain. There is no caſe where the intereſt being the ſame as that ſecured by the deed, it has been holden, that aſſumpſit will lie. In *Foſter* v. *Allanſon* (*b*) there were ſeveral things unconnected with the deed, which were included in the action.

LE BLANC J. No promiſe is ſtated independently of the charter-party.

BAYLEY J. The plaintiffs by ſuing the defendant alone treat him as the only member of the houſe. The caſe of *Rice* v. *Shute* has been much overſtated; for that

(*a*) 12 *Eaſt*, 578. (*b*) 2 *Term Rep.* 479.

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only decided, that where the defendant does not plead in abatement, he is not at liberty to object that there were any other perſons, joint contractors, with him.

Rule abſolute.

Saturday, June 19th.

MORRIS and Others, Aſſignees of SMITH and Others, Bankrupts, *againſt* CLEASBY.

A broker, who pays to *A.* the price of goods ſold by him for *A.* under a del credere commiſſion, is entitled to ſet off the amount againſt the aſſignees of *B*, for whom he bought the goods; and where the jury found a verdict diſallowing ſuch ſet-off, and it was doubtful on the evidence, whether the payment was made before diſcloſure of the name of *A.* to *B.*, the Court granted a new trial.

DECLARATION: In conſideration that the bankrupts would deliver to the defendant goods to be ſold on account of the bankrupts, the defendant undertook to ſell them, and to render a true and juſt account of the ſale, and of the monies ariſing therefrom. Breach; that the defendant hath not rendered to the bankrupts, or to the plaintiffs as aforeſaid, a juſt and true account of the ſale, or of the monies ariſing. 2d count, that the bankrupts had delivered goods to the defendant to be ſold, but the defendant had not rendered a juſt account of the ſaid goods. 3d count, for not rendering a juſt account after the receipt of the monies ariſing from the ſale. 4th count, for not rendering a juſt account of the goods after the ſale thereof. There were alſo the money counts, and an account ſtated. Plea, Non aſſumpſit, with notice of ſet-off.

At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after *Hilary* term, it appeared in evidence that on the 23d *October* 1810, the bankrupts ordered the defendant (a broker) to purchaſe for them, at his public ſale, a quantity of ſpirit of turpentine for exportation. The defendant accordingly made the purchaſe for 1090*l.* 7*s.* 4*d.*, which was agreed to be paid for in bills at 2 months.

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The defendant did not mention to the bankrupts at the time of the purchaſe the name of the ſeller, nor did it appear in the bill of parcels, nor did the defendant deliver any written paper containing the name; but in fact the goods belonged to *Le Meſurier* and Co., and were ſold by the defendant as their broker acting under a del credere commiſſion; but the bankrupts never authorized him to guaranty their houſe to *Le Meſurier* and Co., or ever knew that he had ſo done. Soon after the purchaſe the bankrupts gave the defendant directions to ſhip the goods, who then for the firſt time informed them that *Le Meſurier* and Co. were the proprietors, and referred the bankrupts to them to get the neceſſary documents for ſhipping the goods; after which, the defendant paid *Le Meſurier* and Co. the price of the turpentine; but the preciſe time when he made this payment did not appear. The bankrupts having had ſeveral interviews with *Le Meſurier*, and difficulties having occurred in procuring the ſhipment, abandoned their reſolution of ſhipping, and directed the defendant to re-ſell the goods; who accordingly re-ſold them at different periods, the firſt of which was on the 27th *November*, and the laſt on the 31ſt *Dec.* 1810. The produce of the re-ſales was 683*l.* 4*s.* 5*d.* Before the time ſtipulated for the payment of the turpentine the bankrupts became embarraſſed, and on the 10th of *January* 1811 ſtopped payment. The queſtion was, whether the defendant was entitled to take credit in his account with the aſſignees of *Smith* and Co. for the price of the turpentines ſo paid to *Le Meſurier* and Co. His Lordſhip ſtated the rule to the jury to be this, that a factor repreſents his principal until the principal is diſcloſed, but when that is done, his character of factor is at an end, and the principal becomes the perſon to be dealt

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dealt with. Until that time payments may be made by the factor, and be the subject of set-off by him in his account with the principal. The jury found a verdict for the plaintiff, without allowing the set-off, and in *Easter* term a rule nisi for a new trial having been obtained,

Park and *Reader* now shewed cause, and said, that this was an attempt to convert the broker into a principal; they relied on the rule as laid down at the trial, that if the principal be disclosed before the time when payment is made by the broker, the broker's authority ceases, and he is not entitled to pay; and contended that this rule applied whether the broker is acting under a commission del credere or not; because such a commission between a broker and one principal shall not operate to the prejudice of another principal. Applying then the rule to the present case, the defendant had no right, although he was acting for *Le Mesurier* and Co. under a del credere commission, to pay them for their turpentines to the prejudice of *Smith* and Co. the purchasers, after the time when *Le Mesurier*'s name was disclosed to them; and if the defendant was not entitled to do this, neither can he be entitled to claim such payment by way of set-off.

The Attorney-General and *Parnther* contrà, insisted, 1st, that the defendant was entitled to his claim of set-off. They observed that this was not a question between the two principals, *Le Mesurier* and Co. and the bankrupts, whether their rights were prejudiced, but between the broker and the bankrupts (his principals), whether there was any thing to shew that the bankrupts had interposed to prevent the broker from paying *Le Mesurier* and Co.

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according to the uſual courſe under a del credere commiſſion: if there was not, then the defendant was entitled to pay; and ſuch payment would form an item in the account between him and the bankrupts, who had got the turpentines, and to whom it made no difference, as far as appears, whether they paid *Le Meſurier* and Co., or allowed it in account with the defendant. If then the defendant was entitled to pay, he is entitled to ſet it off. But, 2dly, he is at all events entitled to claim this payment againſt the plaintiffs, who are the aſſignees of *Smith* and Co., by way of mutual credit (*a*); for though it may not be good as a ſet-off, yet, according to *Grove* v. *Dubois* (*b*), there is a great diſtinction between mutual credit and ſet-off; and the ſame diſtinction was recognized in *Cuming* v. *Foreſter*. (*c*)

Lord ELLENBOROUGH C. J. In this caſe I have not ſeen, nor am likely to ſee, any thing to induce me to alter my opinion as to the right of the broker to receive payment until his principal appears. The moment however the principal does appear, provided it be before payment, he comes into his full rights to receive it; that is a rule for the protection of the principal. But yet if the principal authorize his agent to receive payment, ſuch payment will be good againſt him. So under theſe circumſtances if *Cleaſby* had received payment, it would have been good; for to this extent we muſt give effect to the del credere commiſſion, that it authorized him to receive payment, his principal not having countermanded ſuch authority. The only point on which the queſtion for a new trial is to be conſidered, is how far there was

(*a*) 5 Geo. 2. *c.* 30. *ſ.* 28. (*b*) 2 *T. R.* 112. (*c*) 2 *M. & S.* 499.

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a right of ſet-off or mutual credit as it regards the broker. If the broker continued the preſumptive principal, unqueſtionably every right of ſet-off belonged to him which belonged to his principal, but when once the principal is diſcloſed, the right of ſet-off no longer continues. The queſtion then muſt ſtand on the mutual credit. I wiſh to have it better aſcertained, whether this be conſidered as a right of ſet-off or of mutual credit, when the diſcloſure of the principal took place.

LE BLANC J. I think, on the report read by my Lord, that the preciſe time when the money was paid does not appear. I aſſume the facts to be as ſtated at the bar, that the defendant was employed by *Le Meſurier* and Co. to ſell the goods for them under a del credere commiſſion, and that he did ſo ſell them to the bankrupts, by whom he was employed to buy, without diſcloſing to them the names of *Le Meſurier* and Co., and that the bankrupts gave him an order to re-ſell the ſame, which he did, and that payment was not made by him to *Le Meſurier* and Co. till after the diſcloſure of their names to the bankrupts. Upon this ſtatement it ſtrikes me that, this being an action by the aſſignees of the bankrupts, the defendant will be entitled, without breaking in upon any principle of law, to ſet off the amount of the price paid by him to *Le Meſurier* and Co, on account of the bankrupts. The rules of law as they regard principal and broker are for the benefit of the principal. The principal, who ſells through the intervention of a broker, may interpoſe and require payment to be made to him, but after he has dealt with the broker as the real purchaſer of the goods, which by the del credere commiſſion *Le Meſurier* and Co. may be conſidered as having done, the

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broker then ſtands in the ſituation of principal; and in that character he ſells to the bankrupts on his own account. There is no perſon intereſted in contravening the juſtice of the caſe, that the defendant ſhould be allowed in account that price, which the aſſignees now ſeek to take from him. The principal is entitled to claim his rights entire, without reference to what paſſes between the broker and the purchaſer, but where no ſuch rights intervene, the juſtice of the caſe is not to be defeated by the application of a rule of law made ſolely for the protection of the principal. The defendant is taken out of the rule of law the moment he has ſettled the full price with the principal, with whom he was bound to ſettle by virtue of the del credere commiſſion.

BAYLEY J. The juſtice of the caſe is clearly with the defendant. I think alſo the defendant is entitled both under his ſet-off and under his claim of mutual credit. There are many caſes in which a factor may ſue in his own name, where the balance between him and his principal is in his favour. Where the principal gives notice to the buyer not to pay the factor, the buyer will afterwards pay the factor at his peril; but where the principal enables the factor to ſell without naming him, he makes the factor his agent, not only for ſelling, but for receiving the price. It ſeems to me that if the principal employs the factor to ſell by a del credere commiſſion, he wiſhes it to be underſtood that he looks to him for payment, and that he has no objection that the buyer ſhould pay the factor. In *Houghton* v. *Matthews* (*a*) both *Chambre* J. and Lord *Alvanley* conſidered that the effect of a

(*a*) 3 *B. & P.* 489.

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del credere commiſſion was to make the factor reſponſible, for the value of the goods, to his principal. *Chambre* J. refers to *Kruger* v. *Wilcox* for the general poſition that a factor has a lien for his general balance; and then he goes on to ſay, "that where a factor is in advance for goods by actual payment, or where he ſells under a del credere commiſſion, whereby he becomes reſponſible for the price, there is as little doubt that he has a lien on the price, although he has parted with the poſſeſſion of the goods. If he acts under a del credere commiſſion, he is to be conſidered between himſelf and the vendee, as the ſole owner of the goods." Afterwards he refers to *Buller's N. P.* for what is there ſaid, "that a factor's ſale does by the general rule of law create a contract between the owner and buyer; and therefore if a factor ſell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be juſtified in afterwards paying the factor." But he goes on, "it is true Mr. Juſtice *Buller* adds, "yet, perhaps, under ſome particular circumſtances, this rule may not take place, as where the factor ſells the goods at his own riſk; (*i.e.* is anſwerable to the owner for the price, though it be never paid;) for in ſuch caſe he is the debtor to the owner, and not the buyer.'" And this doctrine, that where the factor acts under a del credere commiſſion, he is the perſon warranted to receive the price from the vendee, falls in with the caſe of *Grove* v. *Dubois*. If it were otherwiſe, in what a ſituation would the factor be placed? He would ſtill be liable under his del credere commiſſion to his principal, and yet not have the means of getting the money into his own hands by calling on the vendee. How does this caſe ſtand? The defendant is allowed to

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ſell goods to the bankrupts, without communicating the name of the vendor; he does ſell to them, delivering to them a bill of parcels, from which they would underſtand that he was the perſon to receive payment. If the bankrupts did not pay the defendant, ſtill he would be bound to pay *Le Meſurier* and Co., and therefore he ſtands in the ſituation of vendee. The goods were ſubſtantially the goods of the defendant; he would be the loſer if the bankrupts did not pay; therefore that conſtitutes a mutual credit between him and the bankrupts. The juſtice of the caſe is that way beyond all doubt; for the price muſt ultimately come out of the pocket of the defendant, and it would be hard if he were obliged to pay the price, and then come in for a dividend under the commiſſion.

Rule abſolute.

ALLANSON and Another, Aſſignees of ROBERTS, a Bankrupt, *againſt* ATKINSON.

Saturday, June 19th.

ASSUMPSIT for money had and received. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Hilary* term, it appeared that on the 17th of *July* 1810, *Roberts*, who carried on the buſineſs of a jeweller, had been arreſted upon a ca. ſa. at the ſuit of the defendant, by a ſheriff's officer, who left him in cuſtody of his brother. While in cuſtody, and five weeks afterwards paid over the amount to the defendant:

Where *R.*, a tradeſman, being arreſted at the ſuit of the defendant upon a ca. ſa., placed goods in the hands of the ſheriff's officer to raiſe money upon them, who accordingly pledged them, Held that the aſſignees of *R.*, who had committed an act of bankruptcy before the arreſt, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the ſheriff's officer, and although the money paid to the defendant was not the identical money raiſed by the pledge.

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Roberts propoſed that the brother ſhould take a quantity of goods out of his ſhop and pledge them, to the amount of the levy. A quantity of goods was accordingly taken and pawned on the 19th of *July*, and 22*l.* were raiſed; but that ſum falling ſhort of the amount of the levy, *Roberts* gave him more goods, which were alſo pledged, and made up the difference; the whole money thus raiſed was paid over by the brother to the ſheriff's officer, who, five weeks afterwards, paid it over to the defendant; not, however, in the identical money raiſed by the pledge. On the 28th of *Auguſt* the officer had notice that *Roberts* had committed an act of bankruptcy before the property was taken. It was objected for the defendant, that as he was not privy to the act of the ſheriff's officer in taking the goods, and only received the money in payment of his debt as the money of the ſheriff, and not of the bankrupt, therefore this action was not maintainable; but the proper remedy was by action of trover for the value of the goods againſt the ſheriff, who had taken them. His Lordſhip ſaid it was clear that if the defendant had been privy to the taking he would have been a tort feazor and liable; but he doubted whether the fact of the produce of theſe goods having come into his hands was ſufficient to entitle the aſſignees to this ſpecies of action; and therefore he directed the jury to find a verdict for the plaintiffs, giving liberty to the defendant to move to enter a nonſuit.

A rule niſi for that purpoſe having been obtained in *Eaſter* term,

Marryat and *Campbell* ſhewed cauſe, and contended that it was ſufficient, to entitle the plaintiffs to this action, to ſhew that the act of bankruptcy was committed before

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the money came to the defendant's hands; that if the bankrupt had, immediately upon the arreſt, paid the money to the defendant, ſuch payment would not have been protected, but would have been recoverable as money had and received to the uſe of the aſſignees. The only difference here is, that the money was raiſed circuitouſly by the pledge; but ſtill it was the produce of goods belonging to the bankrupt, and was as much his money, as if it had been paid immediately from his pocket; and it was received by the defendant as ſuch in ſatisfaction of the ca. ſa. That it was money had and received by the defendant to the uſe of the aſſignees appears from *Kitchin* v. *Campbell* (*a*), where the Court ſaid, "Whoever has received the money for the *bankrupt's* goods, is ſuppoſed, in juſtice, to have received the ſame *for the uſe of the aſſignees*, in whom the property of thoſe goods by law was veſted, and to have promiſed to pay the ſame to the *aſſignees*; there is a ſuppoſed privity of contract between the perſons whoſe money it lawfully is, and the perſon who has got or received it."

Topping and *Comyn* contrà. This is not like the caſe of *Kitchin* v. *Campbell*, where it was held that the money ariſing from the ſale of goods, taken after an act of bankruptcy under a fi. fa., may be recovered by the aſſignees, in an action for money had and received, from the perſon who receives it. Here the defendant has not intermeddled with the goods of the bankrupt, nor with the money produced by the goods. If indeed the defendant had got poſſeſſion of the goods, trover might have lain againſt him; or if he had received the preciſe ſum of money raiſed by the pledge, there might have been ſome colour

(*a*) 3 *Wilſ.* 307.

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for saying that he had received the produce of the bankrupt's goods; but he did not receive either the identical notes, or the identical sum. Besides, this was not a payment to the defendant on behalf of the bankrupt, for the defendant was not a party to the transaction, but a payment by the sheriff to relieve himself from a positive breach of duty. He was liable to an action for an escape; and if such action had been brought, he could not have set up the bankruptcy of *Roberts* as a defence. He was liable therefore for the debt. It would be hard then if the Court should deprive the defendant of that which he has received from the sheriff in lieu of the debt.

Lord ELLENBOROUGH C. J. This has been argued as a case of hardship. Suppose this money had been paid in regular form, it would have been recoverable by the assignees, as the money of the bankrupt paid after his bankruptcy. Therefore I cannot say that it is a case of hardship, where, if the payment had been regular, it would have been recoverable. What is the case here? On the arrest taking place the bankrupt, being desirous of time to discharge the debt, proposed to give a part of his goods in order to raise money upon them; for which purpose, he placed them in the hands of the brother of the sheriff's officer, with an explicit authority to convert them into money. It is admitted that if the goods subsisted in specie, trover would lie; and what objection is there, where they have been converted into money, to the action for money had and received? My only doubt was, whether, as the defendant did not appear to be privy to the taking, and as the money paid to him was not the money immediately produced by the disposal of the goods, this was, strictly speaking, the money of the assignees;

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aſſignees; but inaſmuch as the goods of the bankrupt were converted into money, the moment the produce of the goods, in money, came into the pocket of the defendant, I think it became money received to the uſe of the aſſignees.

LE BLANC J. I am of the ſame opinion. The defendant cannot complain of hardſhip. No one, on conſidering the circumſtances, if the queſtion were put to him, whether the money was received in redemption of the officer, or as money paid by the bankrupt, could doubt that it was received by the defendant as money paid by the bankrupt to relieve himſelf from the arreſt. Therefore the defendant received it as money paid under the execution; and whether it was put into the hands of a banker, and mixed with other money, or put into his hands immediately, it is the ſame thing. I think, therefore, the money may be recovered. If the defendant had choſen to object to receiving the money, he might have done ſo, and had his remedy againſt the ſheriff; inſtead of which he is content to receive it as the money of the bankrupt.

BAYLEY J. I concur in the ſame opinion. I think the defendant received this as the money of the bankrupt. He might have diſaffirmed the act of the ſheriff, inſtead of which he affirms it, by receiving the money from the ſheriff, not as the money of the ſheriff, but of the bankrupt. If ſo, the aſſignees are entitled to recover; and there is no other hardſhip in this caſe than in others, where perſons receive the property of a bankrupt after his bankruptcy.

Rule diſcharged.

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Monday, June 21ſt.

NICOLL *againſt* GLENNIE and four others, and G. SHARPE, W. SHARPE, and G. SHARPE the Younger.

In trover againſt ſeveral defendants, all cannot be found guilty on the ſame count, without proof of a joint converſion by all; therefore where plaintiff brought trover for goods againſt *A.* and *B.* bankrupts, and *C.* and *D.* their aſſignees, and proved that the bankrupts, before the bankruptcy, received and afterwards diſpoſed of the goods by way of pledge, having no authority ſo to do; and that the aſſignees, after the bankruptcy took poſſeſſion of the goods, and refuſed to deliver them to the plaintiff on demand, and the jury found all the defendants guilty, there being only one count in the declaration: Held that the evidence did not warrant ſuch finding.

TROVER for 67 tons of flax; the declaration contained only one count. Plea not guilty. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt *Hilary* term, it appeared that the defendants *Glennie* and the four others were aſſignees of the *Sharpes*, the other three defendants, who became bankrupt in *September* 1812. The plaintiff being the owner of the flax in queſtion, conſigned it from *Ruſſia* to his broker in this country, for the purpoſe of ſale. The flax upon its arrival was landed at the wharf of the *Sharpes*, who were the wharfingers and agents of the broker, and after ſome time was pledged to them by the broker on account of bills drawn upon and accepted by them to a conſiderable amount. The flax ſtill continued at the wharf, and, whilſt lying there, was pledged by the *Sharpes* to *Walker* and Co. for advances made by them to the *Sharpes*, and was transferred into the names of *Walker* and Co. Afterwards the *Sharpes* became bankrupt, and the other defendants, as aſſignees, were put into poſſeſſion of the wharf, and the flax, together with the reſt of the property lying there. The plaintiff had ſince demanded the flax of the aſſignees, which they had refuſed to deliver up. The jury upon this evidence found all the defendants guilty; whereupon in *Eaſter* term the *Attorney-General* moved for a rule niſi for a new trial, on the ground that there was no proof of a joint-converſion by all the defendants, to warrant a joint-action againſt them;

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them, though if there had been ſeparate actions the proof might have been ſufficient to affect both the aſſignees and the bankrupts with ſeparate acts of converſion.

Lord ELLENBOROUGH C. J. The objection is rather to the finding of the jury than to the joining all the defendants in one action, inaſmuch as ſeveral may be joined in trover, and yet one only be found guilty. It might have turned out on the evidence to have been a converſion by the bankrupts, continued afterwards by the aſſignees, ſo as to have made it a joint-converſion by all. I do not ſay that is the caſe here; but ſtill the objection is not that all the defendants could not be joined, but that ſome of them ought to have been acquitted.

The rule was thereupon granted; and on a former day in this term *Park*, *Topping*, and *Taddy* ſhewed cauſe, and contended that the refuſal of the aſſignees to deliver up the property, after it came into their hands, and their aſſerting a right to hold it as repreſentatives of the bankrupts, was an adoption by them, and a continuance of the tortious act done by the bankrupts, in poſſeſſing themſelves, and parting with the flax by way of pledge; and they compared it to *Blonholin* v. *Oldham* (*a*), where upon a ſeizure and ſale of the goods of a bankrupt under an execution, trover was held to lie, jointly, againſt the ſheriff, againſt the plaintiff in the original action, and the vendee.

The Attorney-General, *Scarlett*, and *Richardſon*, contrà, admitted that in trover ſeveral might be joined, and

(*a*) 1 *Burr.* 22, cited in *Cooper* v. *Chitty*.

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ſome might be found guilty and others acquitted; but they contended that all could only be found guilty, where proof was given of a joint-converſion by all. In this caſe there was no ſuch proof; for admitting that the pledging of the flax, and the refuſal to deliver it up, were ſeparate acts of converſion by the bankrupts and the aſſignees, as they applied to each reſpectively, there was nothing to connect the one with the other ſo as to form one joint tort. Even if the refuſal by the aſſignees could be conſidered as an aſſent on their part to the tortious act of the bankrupts, it would not operate to make the aſſignees tortfeazers ab initio, unleſs it could be ſhewn that the tortious act was done for their benefit. Therefore in 4 *Inſt.* 317. it is laid down that "by the foreſt-law, whoſoever receiveth within the foreſt a malefactor, in hunting, &c., knowing him to be ſuch, he is a principal treſpaſſer;" but it is added, "wherein the law of the foreſt differeth from the common-law, for by the common-law he that receiveth a treſpaſs, and agreeth to a treſpaſs after it be done, is no treſpaſſer, unleſs the treſpaſs was done to his uſe, or for his benefit, and then his agreement ſubſequent amounteth to a commandment, for in that caſe, omnis ratihabitio retrotrahitur et mandato æquiparatur." And there is alſo this inconſiſtency in the finding of the jury upon this evidence, that the finding the aſſignees guilty acquits the bankrupts, and vice verſa; for a converſion to the damage of the plaintiff ſuppoſes the property to be in him when converted; therefore if the property was in the plaintiff ſo as to charge the aſſignees, there could not have been any prior converſion of it by the bankrupts, or if the bankrupts had before converted it, then the aſſignees are not liable. And by this mode of joining

joining all the defendants in one action, the plaintiff gains an unreaſonable advantage, for thereby he makes the declarations of the bankrupts and the aſſignees evidence againſt each other. Therefore on every account they ought not to have been joined.

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Lord ELLENBOROUGH C. J. obſerved that the queſtion was of very conſiderable extent and importance in its conſequences; and that he had looked to being furniſhed with more caſes upon the ſubject; but concluded from the known induſtry of the counſel who had argued the caſe, that there were none ſuch.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This caſe was argued before us on the queſtion whether there had been a joint converſion by the aſſignees and the bankrupts. It was a caſe where the plaintiff being reſident abroad, tranſmitted goods to his broker in this country, which goods the broker pledged to the bankrupts on account of advances made by them, and the bankrupts afterwards pledged them to *Walker* and Co. for ſimilar advances. Now thoſe are acts of tort and tortious converſion of the goods prior to the exiſtence of the aſſignees, in their character of aſſignees, and as connected with theſe goods; thoſe therefore were acts of tort done without the participation of the aſſignees. There is, however, another act of tort ſtated in the caſe to have been committed by them as aſſignees, namely, their refuſal to deliver up the goods, which were lying on the wharf, and had come into their poſſeſſion as aſſignees; but with this act of tort it does not appear that the bankrupts ever intermeddled. It ſeems to us, therefore,

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therefore, on full conſideration, that the facts of this caſe exclude a joint converſion by all the defendants. No joint converſion is ſtated in point of fact; and we think there is none in point of law. In point of fact, the bankrupts ceaſed to interfere when the aſſignees were put into poſſeſſion of the goods; and in law, they cannot be conſidered as having any controul over them, or as having concurred in the act of refuſal. The caſe to which this has been likened, is that, where goods have been taken by the ſheriff under an execution ſued out againſt a party, who had before then become bankrupt, and whoſe goods had become the property of his aſſignees, in which caſe the act of the ſheriff is conſidered as the act of the plaintiff ſuing the execution. In that caſe, however, the adoption by the plaintiff in execution of the levy of the ſheriff may make him a party to the treſpaſs, upon the principle of omnis ratihabitio, &c. But there is this difference between that caſe and the preſent, that there the law might intend, from the party's ſubſequent adoption of the act, that he was placed in the ſame ſituation as if he had originally commanded the act; but ſuch intendment can only be made, where the party is in a ſituation to have originally commanded it. Now here the aſſignees could never have commanded the original acts of converſion, becauſe, at that time, they did not bear any character which connected them with the goods, and therefore could not be joint-parties to the tort. It appears to us that in none of theſe acts can all the parties be ſo connected together, as to make one joint act of converſion by them: the acts are in themſelves diſtinct. We have not found any material caſes which throw a light upon the queſtion.

Rule abſolute.

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LANGTON and Others *against* HUGHES and Another.

Monday, June 21st.

ACTION for goods sold and delivered. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, it appeared that the plaintiffs were druggists in *London*, and the defendants brewers at *Chester*, that in the months of *June* 1804 and 1805 the traveller of the plaintiffs took orders from the defendants for a quantity of drugs, consisting of *Spanish* juice, isinglass, ginger, and other articles, which he knew were for the purpose of being used in the brewery. The goods were accordingly supplied. Upon this evidence it was objected for the defendant that as by the 42 *G.* 3. *c.* 38. *s.* 20. the brewer is prohibited from using any thing but malt and hops in the brewing of beer, it was illegal in the plaintiffs to furnish the defendants with these articles, knowing the use to which they were to be applied; and that the 51 *G.* 3. *c.* 87. *s.* 17., which was passed since the sale, and which expressly prohibits druggists from selling to brewers articles of this description, did not import that, before that act, they might sell them to brewers with a knowledge that they were to be used contrary to the former act.

Where the plaintiff, a druggist, after the 42 *G.* 3. *c.* 38., but before the 51 *G.* 3. *c.* 87., sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*: Held that he could not recover the price of them.

Lord ELLENBOROUGH C. J. was of opinion that the plaintiffs in selling drugs to the defendants, knowing they were to be used contrary to the 42 *G.* 3. *c.* 38., were aiding them in the breach of that act, and therefore not entitled to recover; and he directed the jury to find for the defendants, but reserved the point. Whereupon a rule

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a rule nisi was obtained in the last term for setting aside the verdict, and entering a verdict for the plaintiffs or for a new trial.

D. F. Jones who now shewed cause, relied as before upon the 42 *G.* 3. *c.* 38. *s.* 20., and on the rule that a party who is aiding in carrying into effect an illegal contract, cannot derive out of it any meritorious cause of action. Here the contract was illegal, because it was founded on an intended breach of the law; and the plaintiffs were aiding in its execution, because they sold and delivered the goods with a knowledge of the illegal purpose for which they were intended; they cannot therefore maintain this action. It may be argued that the statute only prohibits the use of these drugs under a penalty; but the cases of *Law* v. *Hodson* (*a*) and *Parkin* v. *Dick* (*b*) dispose of that argument; and in *Bartlett* v. *Vinor* (*c*), per *Holt* C. J., "every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." The same doctrine was held by *Mansfield* C. J. in *Drury* v. *Defontaine* (*d*). As to the 51 *G.* 3. *c.* 87. it was not intended to confine the prohibition in the 42 *G.* 3. against brewers using any materials or ingredients except malt and hops, to the articles mentioned in the 51 *G.* 3., it was only meant to create an additional security against the traffic of drug-

(*a*) 11 *East*, 300. (*b*) *Ibid.* 502. (*c*) *Carth.* 252.
(*d*) 1 *Taunt.* 136.

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gifts and other perſons with brewers in certain ſpecified articles.

The Attorney-General and *Hullock* contrà, contended that the 42 *G.* 3. prohibited neither the ſelling nor the buying theſe articles, for the purpoſe for which they admitted that they were bought, but only the uſing them. The articles were in themſelves innocent, and ſuch as might be innocently in the brewer's poſſeſſion; and if he might have them he might lawfully purchaſe them. The illegality conſiſts in the ſubſequent uſer, over which the ſeller has no controul; and though he knows the brewer means to uſe, and probably will uſe them illegally, he is not therefore concerned in the tranſgreſſion of the law. If this ſale had happened after the 51 *G.* 3., and the articles had been within thoſe enumerated in that act, it may be admitted that the plaintiffs could not have recovered, becauſe the druggiſt is thereby expreſsly prohibited from ſelling or delivering ſuch articles to any brewer under a penalty; which ſeems, according to the authorities, to amount to a ſubſtantial prohibition; but this being a ſale before the 51 *G.* 3., that ſtatute no otherwiſe applies to this caſe than as an expoſition of the 42 *G.* 3., and ſhews what is meant in that act by the words "other material or ingredient whatever except malt and hops," viz. the deleterious materials which the druggiſt is prohibited from ſelling or delivering by the 51 *G.* 3.

Lord ELLENBOROUGH C. J. The object of the legiſlature, in paſſing the 42d of *George* the Third, was to protect the public health, and the public revenue; the health, which might be impaired by mixing with beer ingredients

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ingredients of a noxious and unwholesome nature, and by trying experiments with the liquors, and a large and important branch of the revenue, by providing that beer should be a liquor compounded of malt and hops only, and not of adulterated materials. There is a distinct prohibition in the act against causing or procuring to be mixed any ingredient except malt and hops; and a person who sells drugs with a knowledge that they are meant to be mixed, may be said to cause or procure, quantum in illo, the drugs to be mixed. So if a person sell goods with a knowledge and in furtherance of the buyer's intention to convey them upon a smuggling adventure, he is not permitted by the policy of the law to recover upon such a sale (*a*); and in the same manner in the case of bricks sold under the statutable size, which the statute requires to be of certain dimensions, for the convenience of building, and perhaps for the benefit of the revenue, the like doctrine has been held (*b*). Without multiplying instances of this sort it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action. This is the rule which governs the decisions upon insurances on contraband trade, and all that class of cases where the party is connected with a previous knowledge of the illegality of the transaction. I do not say whether the 51 *G.* 3 may not have introduced some provisions contrary to the 42 *G.* 3.; but certainly as to others they are cumulative provisions; and the 17th section may well stand with the provisions in the former act. Wherever they inter-

(*a*) *Biggs* v. *Lawrence*, 3 *T.R.* 454. *Clugas* v. *Penaluna*, 4 *T.R.* 466. *Waymell* v. *Reed*, 5 *T.R.* 599.

(*b*) *Law* v. *Hodson*, 11 *East*, 300.

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fere the rule is leges posteriores priores contrarias abrogant. By the 42 *G.* 3. the prohibition is express; and this agreement being in contravention of it, cannot be enforced. It has been very truly said, that the case does not state that the drugs were in fact mixed, but they were sold with a view to be mixed; and the Court will not give sanction to a contract entered into against the policy of the law.

LE BLANC J. It is an established principle, that the Court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect any thing which is prohibited by law. The question here is whether these parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which were sold with a knowledge that they were to be used for a purpose which is prohibited by law, are entitled to recover. That depends upon the provisions of 42 *G.* 3., coupling them in their construction with those of 51 *G.* 3. The 42 *G.* 3. does not prohibit any druggist from selling these articles, but only any person from preparing or mixing, or procuring to be prepared or mixed from any other material or ingredient whatever, except malt and hops, any liquor to resemble or be mixed with beer, and selling the same to any brewer or other person. That is the prohibition: but nevertheless if any person enter into a contract which is to aid the brewer in the breach of this law, such person shall not be permitted to recover upon it: that is the ground upon which the plaintiffs' right is here affected. The statute imposes penalties on the person mixing those ingredients, and selling them when so mixed. Now if

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that be ſo, the party who ſells the ingredients with a knowledge that they are intended to be ſo mixed, is as much diſabled from recovering, as a perſon in *Guernſey* who ſells prohibited goods there, with a knowledge that they are intended to be ſmuggled into *England*; and yet there is no prohibition againſt his ſelling them in *Guernſey*. Upon the ſame ground a perſon ſelling goods in order that they may be exported to a place where by law they cannot be exported, is not permitted to recover the price upon ſuch a contract (*a*). So much for the queſtion as it ſtands on 42 *G.* 3. It has been argued, however, that the 51 *G.* 3. is an expoſition of the 42 *G.* 3., and that inaſmuch as the ſale of iſinglaſs, ginger, &c. are not amongſt the articles, the ſale of which is prohibited by the 51 *G.* 3., therefore the 42 *G.* 3. did not mean to include them under the words other materials or ingredients whatever. It is true indeed that the 51 *G.* 3. does not prohibit the ſale of iſinglaſs and ginger; but impoſes a higher penalty on any druggiſt or other perſon who ſhall ſell certain articles to any brewer, without making it neceſſary that the druggiſt ſhould know in what way they were intended to be uſed; the druggiſt muſt thenceforth not deal with the brewer at all. The 51 *G.* 3. therefore ſeems to have been paſſed diverſo intuitu, for the purpoſe of putting a ſtop to all dealings whatever in thoſe articles with the brewer. In this caſe if the plaintiffs had not been cognizant of the uſe for which the drugs were intended, they might have been entitled to recover, but inaſmuch as they were, the rule of law attaches on them, which prohibits a party from recover-

(*a*) *Lightfoot* v. *Tenant*, 1 *B.* & *P.* 551.

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ing the price of goods ſold, where he knows at the time of ſale that they are to be uſed in contravention of an act of parliament.

BAYLEY J. I am of the ſame opinion. If a principal ſell articles in order to enable the vendee to uſe them for illegal purpoſes, he cannot recover the price. The ſmuggling caſes which were decided on that ground are very familiar. The caſe of *Lightfoot* v. *Tenant* anſwers almoſt all the arguments urged for the plaintiffs. That was a caſe of goods ſold to be ſhipped againſt the proviſions of the *Eaſt India* Company's act, and the Court held that the vendors were not entitled to recover, becauſe they were aiding the vendee to violate the proviſions of an act of parliament; here the plaintiffs were alſo aiding in a ſimilar breach, therefore I think the direction of my Lord was right.

Rule diſcharged.

CATOR, Aſſignee of SPARKES, Bankrupt, *againſt* STOKES, Gentleman.

Tueſday, June 22d.

ASSUMPSIT for money had and received to the uſe of the plaintiff as aſſignee. Plea, non aſſumpſit. At the trial before Lord *Ellenborough* C. J. at the *Middleſex* ſittings after laſt *Eaſter* term, it appeared that the defendant, who was a judgment creditor of the bankrupt, ſued out execution thereon after the act of bankruptcy. An examined copy of the writ of fieri facias, and the ſheriff's return that he had levied the money were produced in evidence; and upon that the plaintiff reſted his caſe, inſiſting that it muſt be preſumed

The ſheriff's return to a writ of fi fa. that he has levied the money is not ſufficient evidence to prove that he has paid it over to the judgment creditor ſo as to charge the latter with the receipt of it, in an action for money had and received.

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CATOR against SOKES.

fumed that the ſheriff had diſcharged his duty, and paid the money over to the defendant; but Lord *Ellenborough* C. J. being of opinion that it was not neceſſarily to be inferred from this return of the ſheriff, that the money had found its way into the pocket of the defendant, but that the plaintiff ought to go farther, and give ſome evidence of its having been paid over, nonſuited the plaintiff.

Park now moved to ſet aſide the nonſuit, and mentioned the caſe of *Gyfford* v. *Woodgate* (a), where it had been holden that the ſheriff's return was primâ facie evidence of the facts ſtated in it, upon the ground that faith was to be given to the official act of a public officer, like the ſheriff, even where third perſons were concerned.

Lord ELLENBOROUGH C. J. Admitting the authority of the caſe cited, it amounts only to this, that the ſheriff's return is primâ facie evidence that he has *levied*, even where third perſons are concerned; but it does not therefore follow that he has paid over the money. The ſheriff indeed after having levied is bound to pay it over; but on the evidence given in this caſe, non conſtat that he has ſo done.

Per Curiam, Rule refuſed.

(a) 11 *Eaſt*, 297.

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JUSON *against* DIXON.

Tuesday, June 22d.

TROVER for a watch. At the trial before *Marſhal* Serjt. at the laſt aſſizes for the county of *Buckingham*, it appeared that a perſon of the name of *Jackman*, who was a baker carrying on his trade at *Wendover*, borrowed the watch of the plaintiff for the greater convenience of his trade, and hung it up on a nail in the ſhop. In *January* 1812 *Jackman* being in arrear for his aſſeſſed taxes, and amongſt others for the houſe and window-tax, the defendant, who was the collector of thoſe duties within the diſtrict where *Jackman*'s houſe was ſituate, entered the houſe, and took the watch from off the nail, as a diſtreſs for theſe arrears, at which time he was told by *Jackman* that the watch was not his but the plaintiff's. There was other property belonging to *Jackman* on the premiſes, ſufficient to have ſatisfied the amount of arrears. The watch was afterwards ſold by the defendant, who, after retaining what was due for the taxes, tendered the overplus of the proceeds to *Jackman*, which he refuſed to accept. The learned Serjeant, upon this evidence, directed the jury, if they believed the watch to be the plaintiff's property, to find damages, which they accordingly did at 6*l*. He then directed a nonſuit with liberty to the plaintiff to move to ſet it aſide and enter a verdict for that ſum, if the Court ſhould be of opinion that he was entitled to recover. A rule niſi for that purpoſe was accordingly obtained in the laſt term.

The collector of the houſe and window-tax under 43 *G.* 3. *c.* 161. may diſtrain, for arrears of thoſe taxes, the goods of a third perſon found on the premiſes charged, though the goods are only borrowed, and the perſon in arrear has other goods of his own on the premiſes ſufficient to ſatisfy the arrears

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Bleſſet Serjt. and *Abbott*, who now ſhewed cauſe, contended that the defendant, as collector of the aſſeſſed taxes under the 43 *G.* 3. *c.* 161. was warranted in ſeizing all ſuch goods as might be found on the premiſes of the plaintiff, in ſatisfaction of the arrears due for the houſe and window taxes, without regard to whom the property in the goods belonged. This they ſaid was the reſult of the ſeveral acts of parliament on the ſubject, and referred to the 43 *G.* 3. *c.* 161. ſched. A., which made the window-tax a charge upon the dwelling-houſe, and *ſ.* 8. by which the ſame perſons are appointed to be collectors as are appointed under 43 *G.* 3. *cc.* 99. and 150. with the like powers as are given by thoſe acts reſpectively. Now the 43 *G.* 3. *c.* 99. *ſ.* 33. empowers the collectors, on refuſal by any perſon to pay the duties charged upon him under the regulations of that act, "to diſtrain upon the meſſuages, "lands, tenements, and premiſes, charged with any "ſum of money, *or* to diſtrain the perſon ſo charged, "by his goods and chattels, and all ſuch other goods "and chattels as they (the collectors) are hereby autho-"rized to diſtrain." The word *or* in the diſjunctive ſhews that the two branches of the ſentence were each intended to make a ſeparate proviſion. The meaning probably was, that the collector might diſtrain, on the premiſes, any goods, to whomſoever they might belong; *or* might diſtrain the defaulter by his goods off the premiſes, whereſoever they ſhould be found; and the concluding words, "all ſuch other goods," &c. expreſsly point at other goods than the goods of the debtor. Then the 38th ſection enacts that "all remedies, ad-"vantages, powers, &c. which by any act or acts con-"cerning bankrupts, or concerning the method of re-

"covering

"covering rent in arrear, are given to any creditors, "leſſors, or landlords reſpectively, ſhall be uſed by the "collectors under this act, over and above the powers "contained in this act." It may be argued, perhaps, upon the wording of this ſection, that it does not give to the collector the common law right of the landlord to diſtrain all goods found on the demiſed premiſes, but that it only gives ſuch additional powers as are conferred upon landlords by ſtatute; but ſurely that would be a ſtrange conſtruction of the act, which would give to the collector a right to follow and ſeize goods carried off the premiſes, and yet would not empower him to ſeize them whilſt they were found on the premiſes. The land tax acts contain a ſimilar proviſion, as to the power of diſtreſs, with the act now in queſtion, and may be prayed in aid of the conſtruction contended for by the defendant; the 38 *G.* 3. *c.* 5. *ſ.* 17. (*a*), enables the collector to levy the ſum aſſeſſed, by diſtreſs and ſale of the goods and chattels of the perſon refuſing to pay, or to diſtrain upon the meſſuages, lands, tenements, and premiſes charged; evidently taking a diſtinction between a diſtreſs on the premiſes and a diſtreſs on the goods of the party. The ſame diſtinction is now contended for, and, if good, authorized the defendant to take the property of the plaintiff, it being found upon the premiſes.

Sellon Serjt. and *Beſt*, contrà, denied that the 38 *G.* 3. *c.* 5. could help to explain the 43 *G.* 3. *c.* 99. inaſmuch as by the firſt ſection of the latter act the land tax is expreſsly excepted from its regulations; ſo that the two ſtatutes are not in pari materiâ. They alſo denied that

(*a*) Not printed at length in *Runnington's* edition of the Statutes. See *Burn's Juſtice*, tit. Land-Tax, 5. Collecting.

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the 43 G. 3. c. 99. ſ. 33. empowered the collector to ſeize any other goods, than the goods of the perſon in arrear. To diſtrain on the meſſuage, &c., it may be admitted, applies to the goods on the premiſes; and to diſtrain the perſon by his goods, very probably applies to goods not on the premiſes; but ſtill there is nothing to extend the remedy to goods not the property of the perſon diſtrained; the act ſtops ſhort of giving the common law remedy of the landlord to the collector, which if it had been intended to give, it would have ſo expreſſed. There are ſeveral clauſes in this act which cannot be reconciled with the conſtruction, that the landlord's remedy was the thing meant. The 35th ſection, for inſtance, recites, that "whereas it may frequently happen that "perſons quitting their dwelling-houſes or places of re"ſidence, may remove to other pariſhes or places, with"out firſt diſcharging the duties charged upon them, "*whereby the ſaid duties made payable by this act will be* "*loſt, unleſs the perſon or perſons removing, can, after ſuch* "*removal, be made to pay*". &c. It may be aſked, how this clauſe is to be reconciled with the conſtruction that the act gives the collector the like remedy with the landlord; for if it does, how could the duties be loſt by ſuch removal, when the goods of the ſucceeding occupier would be liable? The 33d ſection, on which the defendant relies, is at beſt but an ambiguous one; the words, "all ſuch other goods and chattels as they are hereby authorized to diſtrain," &c. it is ſaid can only mean the goods of other perſons; but where does this act authorize them to diſtrain the goods of other perſons? The 37th ſection does indeed authorize them to diſtrain goods already taken in execution, if the party ſuing out the execution refuſe to pay the arrears of taxes due from his

his debtor; and it is probable that to such authority the above words in the 33d sect. refer. But the collector's power is derived wholly from the statute, and the statute has not given him any other of the landlord's remedies, than such as are conferred upon the landlord *by any act or acts*; whereas the remedy which the landlord has of distraining all goods found upon the premises to whomsoever belonging, is not a statutable remedy, but one which is derived to him by the common law. The window and house taxes are not a charge on the premises but on the person only; the land and property taxes are the only taxes which are a charge on the land. That the window tax is not such, appears from 43 G. 3. c. 161. Sched. A. Rules 4 & 5. charging the occupier, or his executors, &c., annually, or in case of a change in the occupation, according to the time of his occupation; and Sched. B. Rule 1. as it respects the duties on houses, has a similar provision. Upon the whole, a comparison of these acts will be found not to support the positions contended for on the other side.

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Lord ELLENBOROUGH C. J. This is an action by the owner of a personal chattel, viz. a watch, found by the defendant hanging up in the house of a person who was in arrear for house and window tax, and seized by the defendant as collector of assessed taxes, for the arrears so due, not from the owner of the watch, but from the person in whose house it was found. The question is, whether this watch, not being the property of the debtor to the crown, is liable to be taken in respect of the place in which it was found; in other words, whether by the act of parliament the collector has the same power of distress, which a landlord has for rent, namely,

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namely, to diſtrain any goods which may be found on the premiſes. The collector acted under the 43 *G.* 3. *c.* 161. *ſ.* 8. which gives him all the powers contained in 43 *G.* 3. *c.* 99. By the 33d ſection of this laſt act, the collectors are empowered "to diſtrain upon the meſſuages, lands, "tenements, and premiſes charged with any ſum or "ſums of money, or to diſtrain the perſon or perſons "ſo charged, by his or their goods and chattels, and all "ſuch other goods and chattels as they are hereby au-"thorized to diſtrain." The expreſſion of diſtraining on the premiſes is found in the land tax act 38 *G.* 3. *c.* 5., and was probably uſed in other prior acts, becauſe we know that all the land tax acts are very ſimilar. As applied to a landlord's remedy for his rent, it is a familiar expreſſion, and muſt be underſtood in the ſame ſenſe, when applied to the officer of the crown: and the latter part of the ſentence, "and ſuch other goods," &c. ſhews that other goods than thoſe which were the property of the party were intended to be ſubjected to the diſtreſs; and theſe latter words can only be made operative by giving to the preceding words "to diſtrain on the pre-miſes" their ordinary ſenſe when applied to landlords. And really there is great convenience in giving this conſtruction to the ſtatute, in order to protect the collector from the peril to which he might otherwiſe be expoſed by the tricks of defaulters if he were anſwerable for ſeizing the goods of third perſons found on the premiſes, and from which this ſection ſeems to have been intended to relieve him. The collector therefore is put in the place of landlord; it is enough for him that the goods are upon the premiſes. Thus the caſe ſtands upon *ſ.* 33. but *ſ.* 38. reflects light upon it. That ſection gives to the collectors "all remedies and powers which, by any act or acts con-

concerning bankrupts, or concerning the method of recovering rent in arrear, are given to creditors, lessors, or landlords;" but it cannot have been meant to give them the same remedies which were given to landlords by statute, unless it was also meant to give them the means to conduct them to that end, namely, the remedy which the landlord possessed at common law. If such would be the probable construction of *s.* 33., it is therefore rendered more probable by *s.* 38. It would certainly have been more simple and direct, to have said that the officer should have all such powers as landlords have; but though the legislature have spoken indistinctly, the question is whether they have not spoken to the same effect, and by extending the power of distress to other goods than those of the party, have not virtually extended it to goods found on the premises. As to the 37th section, it relates to another subject, and affords no argument against this construction of the 33d section; it places the collector, in the case of an execution sued out against the goods of any person in arrear for taxes, in the same situation as the landlord is placed in, by other statutes, in case of an execution sued out against the goods of his tenant whose rent is in arrear. It therefore rather shews that the legislature intended to give the collector all the landlord's remedies.

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LE BLANC J. The Court is called upon to put a construction upon the 43 *G.* 3. *c.* 99. *s.* 33., and the question is, whether the power to distrain on the messuage and premises, means any thing different from distraining on the person by his goods and chattels. The collector has distrained for the window tax, amongst other assessed taxes. In order to discover the meaning of the legislature, we must look at the other clauses of this act,

1814. acts, and at other revenue acts, in which the same expression occurs. Amongst others, we have been referred to the 38 G. 3. c. 5., where the distinction is very clearly marked; for the collector is there empowered to levy the sum due, by distress and sale of the goods of the person neglecting or refusing to pay, or he may distrain upon the messuages, lands, tenements, or premises; evidently not including the same things in the one expression as in the other; and it is impossible to give them any other construction than this, that they apply to distraining upon the goods of the person, wheresoever found, and upon goods on the premises, to whomsoever belonging. The 43 G. 3. c. 99. s. 38., though it does not give, in express terms, all the powers given to the landlord, shews clearly that the legislature intended to put the collector, for many purposes, in the situation of landlord; and that affords a clue to the construction of the 33d section, which gives him authority to distrain upon the messuages, lands, tenements, and premises. Looking at this, and the other acts upon similar subjects, I think it clear that the legislature meant to arm the collector with a power similar to that which a landlord possesses, viz. to take any goods found on the premises of a debtor of the crown.

BAYLEY J. I am of the same opinion. I think that the 43 G. 3. c. 99. s. 33. gives the power to the collector in the alternative, either to distrain any goods, to whomsoever belonging, which may be found on the premises; or to distrain the goods of the defaulter wherever they may be found. The meaning of distraining on the messuage is explained by a reference to the land tax acts; it is there put in contradistinction to

to diſtraining the goods of the party, and means generally the goods of any perſons whatever which may be found on the premiſes. The 38th ſection certainly throws light upon the 33d; if, as it has been contended, that ſection confines the remedies given to collectors to the ſtatutory remedies of landlords, it falls in exactly with the conſtruction that the former ſection was intended to give the common law powers; for the 38th ſection ſuperadds the remedies, which it gives, "over and above the powers contained in this act."

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JUSON *againſt* DIXON.

Rule diſcharged.

GRAHAM *againſt* TATE.

Tueſday, June 22d.

Where the tenant of premiſes, under a leaſe, and at a rent payable half-yearly, agreed to pay all taxes, except the landlord's property-tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord alſo agreed to allow, but afterwards diſtrained for half-a-year's rent, and ſold to the whole amount, without allowing either for repairs or property-tax, which he knew the tenant had paid to the collector: Held that the tenant might recover, in reſpect of the property-tax, but not in reſpect of the repairs, in an action for money had and received againſt the landlord.

ASSUMPSIT for money paid, laid out and expended, money had and received, and on an account ſtated. Plea, non aſſumpſit.

At the trial before *Clayton* Serjt. at the laſt *York* aſſizes it appeared, that the plaintiff had been tenant to the defendant of a houſe and land under a leaſe for a year, at a certain rent payable half-yearly; the tenant to pay all taxes, except the landlord's property tax, which the defendant agreed to allow; and the tenant agreed to lay out 20*l.* in repairs, which the defendant alſo agreed to allow. The laſt half year's rent having been in arrear, the defendant diſtrained, and ſold to the whole amount, without any deduction either for repairs or for the property tax, which had before that time been paid by the plaintiff to the collector, and was known to the defendant

to

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to have been so paid. At the trial it was objected for the defendant, that the money was not recoverable in this form of action; that as to the property tax, the stat. 46 *Geo.* 3. *c.* 65. had provided that it might be deducted out of the first payment thereafter to be made on account of rent (*a*); and if this action were maintainable, every landlord, who had not allowed the property tax, would be liable to an action by his tenant without notice. The learned Serjeant nonsuited the plaintiff, giving liberty to move in order to bring the question before the Court. Accordingly a rule nisi having been obtained in the last term for setting aside the nonsuit, and entering a verdict for the plaintiff,

Hullock now shewed cause, and contended, that neither the money for repairs nor for the property tax were recoverable in this form of action: that as to the allowance for repairs, there was a special agreement under which the plaintiff ought to have declared, and not in this form of action; and as to the property tax, it seemed doubtful whether any action would lie for it; for the whole rent having been levied by the landlord without making the proper allowance in respect of the property tax, the plaintiff might have obtained the deduction by an application to the commissioners of the district. But supposing an action would lie, still the plaintiff has mistaken his remedy. The moment the property tax was paid to the collector, it became a payment of rent pro tanto; therefore at the time of the distress, the rent due, was only the half-year's rent minus the property tax. Now the levying a sum of money by distress, beyond the amount of the rent due, is not the subject of an action

(*a*) Sched. A, No. 4. Rule 9.

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for money had and received, but of a ſpecial action on the caſe on the ſtatute of 2 & 3 *W. & M. ſeſſ.* 1. *c.* 5. *ſ.* 2., which directs that after the ſale of a diſtreſs the overplus (if any) ſhall be left in the ſheriff's hands for the owner's uſe.

Barrow, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. The tenant was obliged to pay the full amount of the rent under the diſtreſs, if the landlord would not conſent to make the deduction in reſpect of the property tax; and it does not appear to me that he has any remedy except by bringing an action. If ſo, the only queſtion is as to the form of the action. It ſeems to me that he may wave the tort and bring an action for money had and received, if, in the reſult, the landlord has got money into his pocket, which does not belong to him. If any conſequential injury had been ſuſtained, damages for ſuch injury muſt have been recovered in another form of action.

LE BLANC J. The landlord having diſtrained upon the goods for rent, the tenant, in order to redeem them, was obliged to pay what he demanded. I ſhould doubt whether the commiſſioners could have compelled the landlord to refund.

Lord ELLENBOROUGH C. J. added, that the Court was of opinion in favour of the defendant upon the queſtion of repairs.

Per Curiam, Rule abſolute.

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Wednesday, June 23d.

The KING *against* The BAPTIST Mill Company.

The leſſees, under the lord of the manor, of lot and free ſhare of all calamine raiſed within the manor, are liable to be rated to the poor, as *occupiers of land*, in the pariſh where the manor lies; none of them being reſident in the pariſh.

THE defendants were rated to the relief of the poor of the pariſh of *Rowberrow*, in the county of *Somerſet*, under the following aſſeſſment;

Proprietor,	Occupier,	
John Leacroft, Eſq.	*Baptiſt Mill* Company	— For lot, toll, and free ſhare of the calamine and for calamine yard, and barn. Amount 9*l.* 0*s.* 0*d.*

Againſt which aſſeſſment they appealed to the quarter ſeſſions, when the juſtices directed the rate to be amended by expunging therefrom "the calamine yard and barn," and aſſeſſing the "lot, toll, and free ſhare of the calamine," at the ſum of 8*l.* 13*s.* 2*d.* inſtead of 9*l.*, ſubject to the opinion of this court, on the queſtion whether the lot, toll, and free ſhare of calamine was, or is rateable, upon the following caſe:

By indenture of the 1ſt of *October* 1810, reciting that *John Leacroft*, as lord of the manor of *Rowberrow* in the county of *Somerſet*, was entitled to a lot, toll, or free ſhare of all calamine or lapis calaminaris raiſed within the manor, in the proportion of one part in four, and which had been lately received by him at only three parts in twenty in the incloſed lands, but was not yet aſcertained in the unincloſed lands; and alſo reciting that certain perſons therein named, ſtiling themſelves the *Baptiſt Mill* Company, had agreed to take the ſaid lot or free ſhare of the ſaid *John Leacroft*; the

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ſaid *John Leacroft* demiſed to the ſaid perſons ſo ſtiling themſelves the *Baptiſt Mill* Company, all that the ſaid part, purpart, lot, and free ſhare of the ſaid *John Leacroft*, as lord of the manor of and in all calamine ſtone or lapis calaminaris raiſed or gotten, or to be raiſed or gotten in the incloſed lands, or the waſtes or other lands within the ſaid manor, or which he had right to claim or demand; with liberty to take and carry away the ſame: and alſo a building in *Rowberrow* called the Calamine Barn, with the oven therein to calcine calamine, together with the yards and other buildings and premiſes belonging to the ſame: to hold to the leſſees, their executors, &c. for a term of 10 years, yielding and paying therefore the yearly rent of 210*l.* half-yearly, on the 1ſt of *April* and 1ſt of *October*; the firſt payment to be made the 1ſt of *April* following. The ſaid manor of *Rowberrow* is in the pariſh of *Rowberrow*, and the ſaid *John Leacroft* is ſeiſed in fee of the ſaid manor, and of the mines within the ſame. Before the making of the rate above mentioned the leſſees underlet the calamine barn and yard to *Thomas Tovey*, who at the time of making the rate and ſince has occupied the barn and yard. There are no other buildings or premiſes, and the *leſſees are not nor were at the time of making the rate, in the occupation of any land or buildings whatſoever within the pariſh of* Rowberrow, *unleſs the Court ſhall be of opinion, as the Seſſions were, that the lot, toll, and free ſhare above mentioned are to be conſidered as land.* All the leſſees reſide in *Briſtol*, and their agent lives in *Shipham*, an adjoining pariſh to *Rowberrow*, but attends frequently at the different calamine pits in the pariſh of *Rowberrow* to collect the free ſhare from the miners, who raiſe the calamine. The leſſees run no riſk nor incur any expence whatever, and have

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ſince the commencement of the leaſe received a quantity of calamine, as the lord's lot, toll, or free ſhare, of a conſiderable value.

C. F. Williams, and *W. G. Adam*, in ſupport of the order of ſeſſions, relied upon the rule laid down by *Eyre* C. J. in *Lord Bute* v. *Grindall* (*a*), "that the perſon who is in the poſſeſſion of the immediate profits of land, may be taxed to the relief of the poor, in reſpect of thoſe immediate profits; that quoad theſe immediate profits of the land, he is an occupier of the land, within the meaning of thoſe authorities which have decided that the occupier only can be aſſeſſed to the relief of the poor." They urged that the leſſees were entitled, under this conveyance, to all the rights which the lord of the manor was entitled to, i. e. to one-fourth of the immediate profits of the land; and they cited *Rowls* v. *Gells* (*b*), and *Rex* v. *St. Agnes* (*c*), as deciſive, unleſs the authority of thoſe caſes could be impugned. The ſubſequent caſes of *Rex* v. *Nicholſon* (*d*), and *Williams* v. *Jones* (*e*), will not be found to impugn their authority; for they only decided that the leſſee of a ferry was not rateable in reſpect of the occupancy of the tolls unconnected with any viſible property in the pariſh; and in *Rex* v. *The Biſhop of Rocheſter* (*f*) the Court, in deciding that the truſtees of certain mines were not rateable, in reſpect of the rent reſerved on a leaſe of them, which contained a liberty to the tenants to dig for ore, &c. expreſsly ſtated "that if hereafter the tenants ſhould open the ground and raiſe the ore, the truſtees would then be entitled to certain

(*a*) 2 *H. Bl.* 266. (*b*) *Cowp.* 451. (*c*) 3 *T. R.* 480.
(*d*) 12 *Eaſt*, 330. (*e*) *Ibid.* 346. (*f*) 12 *East*, 353.

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proportions, and such profits might come within a different rule, as lot and cope."

Horner and *E. Lawes* contrà, relied upon *Rex* v. *Nicholson*, and *Williams* v. *Jones*, as establishing this principle, that a person is not rateable as occupier of an incorporeal hereditament, unless it be annexed to some local visible property within the parish. They then argued that the defendants under the conveyance to them from *Leacroft* took merely an incorporeal hereditament, which was not properly the subject of demise, because not a thing manurable, out of which a rent could be reserved, or to which the lessor might have resort to distrain (*a*): neither would trespass quare clausum fregit lie for it, but only upon an asportavit as for goods and chattels. And it is expressly negatived that the defendants were the occupiers of any land within the parish, unless the lot be considered as such. This therefore being only an incorporeal hereditament and not annexed to any local visible property, the case falls precisely within the principle above stated, and must be governed by it. It may be further observed that this mineral, whilst it remained in its native bed, was not the subject of taxation, because the mine itself is virtually excepted out of the 43 *Eliz.* by the express mention of coal mines only; and therefore if the mineral is rateable at all, it must be so after it has been raised and separated from the mine, and become vested in the defendants as personal property only. The case of *Rowls* v. *Gells* may perhaps admit of such a clear distinction as will make it unnecessary to controvert its authority, though it may be observed that Lord *Kenyon* in *Rex* v. *Parrot* (*b*) seemed to doubt it. But the ob-

(*a*) *Co. Lit.* 47. *a.* 144. *a.* (*b*) 5 *T. R.* 596.

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vious distinction is this, that there the lessee of the crown was stated to be the occupier of other visible property, and not, as here, of the lot and cope only; for the case states that he was entitled to the privilege of quarter-cord, which is a right of using a certain portion of land adjoining to the mine, for the purpose of working it. *Rex* v. *St. Agnes* also comes within the same distinction, because the toll-tin was gotten in the lands of the person held to be rateable. If however these cases should be thought not capable of such distinction, then it is submitted, that they go too far, and ought to be re-considered upon the present occasion.

Lord ELLENBOROUGH C. J. If these lessees of lot, toll, and free share are rateable at all, it appears to me they must be rateable as for property falling under the description of land. The question is, whether the words "all that part, purpart, lot, and free share of *J. Leacroft*, as lord of the manor, of and in all calamine stone raised or gotten, or to be raised or gotten," &c. can be considered, within the meaning of the statute for the relief of the poor, as land. There may perhaps be doubts whether these lessees representing the lord of the manor, in whom the right subsists as the real owner, could in law have maintained trespass quare clausum fregit for this calamine stone. I do not pronounce an opinion on that. This however appears to me to be a demise of a specific portion of the produce of land, or in other words, land itself, free from risk or uncertainty; it is by the express terms of the finding stated to be an interest without risk. We might otherwise have been pressed with the question, whether the naming coal mines in the statute, was, according to the rule expressio unius exclusio alterius, to

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all intents an excluſion of other mines; or was only put for example, as the naming a claſs in the ſtatute of circumſpecte agatis (*a*): for certainly the Judges who have held it to amount to the excluſion of other mines, have generally coupled it with this reaſon, that other mines are ſubject to riſk. Now here the portion of calamine is diveſted of riſk; it is the clear profit, to which the lord is entitled, independent of any contingency. It is not ſtated whether it is by agreement, or cuſtom, that the perſon who works the mine is bound to yield to the lord a portion. It is merely ſtated that the lord is entitled to one part in four. However that may be, here the whole is raiſed by the labour of the adventurer, and, when raiſed, the lord is entitled to one-fourth of it. Until raiſed, the lord may be conſidered as working with the adventurers by the hands of the labourers; but, when raiſed, the lord's ſhare redounds to him. That conſtitutes land, and may be fairly conſtrued as ſuch within the meaning of this ſtatute. The caſe of *Rowls* v. *Gells*, and the other caſes, do not admit of any diſtinction comprehending this caſe. This is not merely a demiſe of a perſonal chattel, of the ore after it is gotten, but of the ore which is to be gotten, and which is part of the ſolid maſs of the land; therefore under that deſcription it is aſſeſſable in the hands of the occupier.

LE BLANC J. I concur in opinion with my Lord that this property is rateable to the poor. From the time of its deciſion in 1776 down to the preſent time, I believe the caſe of *Rowls* v. *Gells* has never been determined to be other than law; on the contrary it has been acted

(*a*) 2 *Inſt.* 487.

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upon in thoſe counties where property of this deſcription ſubſiſts. It has been held that perſons who are not inhabitants muſt, in order to become rateable, be the occupiers of ſome ſpecies of property falling within the ſtatute. The queſtion has always been whether the party rated could or could not be brought within the deſcription of the ſtatute. The ſtatute deſcribes this claſs of perſons as occupiers of lands, houſes, tithes, coal-mines, or ſaleable underwood. The conſtruction that has been put upon the ſtatute has been this, that whereas the legiſlature expreſſed coal-mines, they did not mean to include any other mines; and the reaſon given for ſuch a diſtinction was, that other mines were conſidered as matters of hazard at that time, and therefore it was concluded that the legiſlature did not mean to ſubject the occupier of ſuch a ſpecies of property to taxation. It remains then to be ſeen what conſtruction the deciſions have put on the words, "occupier of land," in order to determine whether a party, who is in the receipt of a conſiderable revenue, which is not ſubject to riſk, and ariſes out of land, may not be comprehended under the term occupier of land. In determining this, we are not tied down to follow the ſtrict definition of land through all its conſequences and in every poſſible view in which it may be conſidered, and to decide whether this would enable the party to maintain treſpaſs quare clauſum fregit, or whether it correſponds in every other incident with the definition of land. In *Rowls* v. *Gells* it was conſidered that the lord who received a ſtipulated benefit from the profits or value of mines, in caſe they did prove of value, was an occupier jointly with the adventurers, and not excuſable, upon the ſame ground that excuſed the adven-

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turers, namely, that the adventure was uncertain, or might prove unſucceſsful; but the lord was held for the purpoſe of being rated as an occupier. Here the party ſhares with the adventurer, without incurring any riſk, and *Rowls* v. *Gells* determined ſuch perſon to be chargeable as occupier. What reaſon is there for ſaying that *Rowls* v. *Gells* was an erroneous deciſion? It is not neceſſary in conſtruing the words of this ſtatute, which was paſſed for a particular purpoſe, to hold that the word lands ſhould ſatisfy every poſſible view under which land may be conſidered. Here it is enough that the party is an occupier of land for the purpoſe of being rated to the relief of the poor. Where a perſon receives, without riſk, part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent, or money payment, there the Court has held, as in *Rex* v. *Biſhop of Rocheſter*, that he is not an occupier. It is ſaid, however, that we ought to overturn *Rowls* v. *Gells*, and *Rex* v. *St. Agnes*, unleſs we can diſtinguiſh them from this caſe, but I ſee no reaſon why the Court ſhould hold thoſe caſes to have been improperly determined, eſpecially where they have laid down a rule of conſtruction which has prevailed for nearly 40 years, and has been the guide of the courts below. As to diſtinguiſhing them I cannot feel the weight of the obſervations which have been made with that view. In *Rowls* v. *Gells* and *Rex* v. *St. Agnes* the rate was confined to the perſon in reſpect of the toll-diſh of lead and tin raiſed; here the owner of the land is entitled to a certain portion of the ore when raiſed, which he lets, or allows perſons to ſtand in his place as to that ſhare; and we will not enquire whether this was a legal demiſe, for he authorizes them to receive and

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they do receive it. They ſtand therefore in the ſituation of the leſſee in *Rowls* v. *Gells*, and the perſon entitled in *Rex* v. *St. Agnes*. But ſubſequent caſes have been cited in which it is ſuppoſed that the authority of *Rowls* v. *Gells* and *Rex* v. *St. Agnes* has been diſturbed; which ſuppoſition is only raiſed by laying hold of particular expreſſions of the Court to be found there. The caſes of *Williams* v. *Jones* and *Rex* v. *Nicholſon* are totally different; for thoſe were the profits of a ferry, ariſing out of a right to convey paſſengers over a river; it was impoſſible in thoſe caſes to ſay that the perſons were occupiers of any thing but the boat and tackle in which the paſſengers were conveyed, in the ſame manner as a ſtage-coachman is the owner of his coach; it was therefore impoſſible to make the doctrine of *Rowls* v. *Gells* bear on thoſe caſes. Viewing all the caſes on the ſubject, and the principle upon which *Rowls* v. *Gells* was decided, and likewiſe the public convenience, as it regards this ſpecies of property, and not ſeeing that the original conſtruction on the words, occupier of land, may not comprehend a perſon ſo far an occupier as to receive a portion of the land diſcharged of any riſk, I cannot ſay that this company is not rateable.

BAYLEY J. I am of the ſame opinion. The ſoil belonged to *Leacroft*, as lord of the manor; the perſons working the mines are not tenants under him, but he has the actual occupation and poſſeſſion of all the land and the ſubject of the land. The workers of the mines have, as a compenſation for their labour and expences, a certain part of the profits, and the owner of the ſoil has a ſhare alſo, which is given to him not in the character of landlord, but as his ſhare of the immediate pernancy

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of the profits of the land. I consider him as having a qualified occupation, perhaps a more direct one than the adventurers, who may be considered as servants to him, for they work the land to a certain extent for his benefit, and are to pay him his share of the original produce of the land. In *Rex* v. *The Bishop of Rochester* the lessors had dispossessed themselves of all right of occupation, by leasing the mines; and it was attempted to rate them in respect of the rent reserved to them as reversioners, the sole right of occupation being in another person. So in *Rex* v. *Nicholson* and *Williams* v. *Jones* there was no pretence for setting up any person as an occupier of land. The cases of *Rowls* v. *Gells* and *Rex* v. *St. Agnes* proceeded on the idea that the lord might be considered as occupier of lands, and rateable in that respect. Indeed it is conceded that if the lord had not made a lease he would have been rateable; but a distinction is made that here is a demise, not of the land, or any interest in the land, but of lot, toll, and freeshare; and so it does not operate until the lot, toll, and freeshare are severed from the land; but it seems to me as if the lease demised a share in the produce of the land before the mineral is raised: it was intended that these lessees should have every benefit, which would otherwise have resulted to the lord. I cannot therefore distinguish this from the case of granting a share in the land, which is not co-extensive with the entire interest. It is not doing any violence to this lease to consider the lessees under it as occupiers of land. I lay out of consideration all the cases in which it has been holden that adventurers are not liable.

Order of sessions confirmed.

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Wednesday, June 23d.

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Hiring for a year at 13*s.* 6*d.* per week, and to be at liberty to be abſent during the ſheep-ſhearing ſeaſon, but to find a fit man, *at his own expence*, to do his work during his abſence, *but his own wages to go on during the whole time*, will not gain a ſettlement.

UPON appeal, the court of quarter ſeſſions quaſhed an order of two juſtices removing a pauper from the pariſh of *Arlington* to the pariſh of *Wilmington*, both in the county of *Suſſex*, ſubject to the opinion of this Court on the following caſe: the pauper was hired for a year from *Michaelmas* 1809 to *Michaelmas* 1810, as ſhepherd to *J. King*, of *Wilmington*, to receive 13*s.* 6*d.* per week wages, and an allowance for a hog, and to be at liberty to be abſent during the ſheep-ſhearing ſeaſon, but to find a fit man at his own expence, to do his work during the time of his abſence, but his own wages of 13*s.* 6*d.* a week were to go on during the whole time. The pauper ſerved the year in *Wilmington* accordingly, was abſent during the ſheep-ſhearing ſeaſon, and employed and paid a perſon to tend the flock, but occaſionally returned during that period, and aſſiſted in the management of it, eſpecially on *Sundays*, and from time to time gave directions to the perſon employed by him.

D'Oyly and *Roe*, who argued againſt the order of ſeſſions, were called upon by the Court, and aſked how a year minus the ſheep-ſhearing ſeaſon could be made to amount to a year. They admitted that if it was to be taken as part of this contract, that the pauper had an unconditional liberty of being abſent during the ſheep-ſhearing ſeaſon, the caſe would fall within *Rex* v. *Empingham* (*a*); but they relied on this diſtinction, that this

(*a*) *Burr.* S.C. 791.

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was only a conditional liberty of abſence provided the pauper could find a ſubſtitute at his own expence, but his wages were ſtill to go on as uſual, which implied a continuance of the ſervice, and it appears he did occaſionally come backwards and forwards. Under theſe circumſtances the queſtion was whether the ſervant of *A.*, though for a time working with another perſon, might not continue the ſervant of *A.*, or whether this was any thing more than an alteration in the nature of his ſervice with his original maſter.

Lord ELLENBOROUGH C. J. It has never been determined that a contract for ſervice by deputy is ſervice by himſelf. The diſtinction taken in all the caſes is whether the liberty of abſence forms a part of the original contract, ſo as to be an exception out of it, or whether it be by permiſſion of the maſter during the continuance of the contract. If this hiring could be deemed to confer a ſettlement, the conſequence would be that a perſon might gain as many ſettlements as there are 40 days in one year. He might hire himſelf to *A.*, with liberty to be abſent with *B.* and *C.*, and ſo on, and if he could get 40 days ſervice with each, he might accumulate eight or nine ſettlements in the courſe of a year. Such a conſequence would be prepoſterous. What does this hiring really mean? A hiring for a year is where the ſervant is to be under the controul and command of his maſter for the whole year; but here the pauper was not to be ſo, but was to be at liberty to find a ſubſtitute for the ſheep-ſhearing ſeaſon. The caſe will ſcarcely bear a ſerious argument. It has been laid down in *Rex* v. *Empingham* and other caſes, that if it be an exception out of the original contract at the time of making it, no ſettlement

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tlement can be gained under it; here it was an exception, and therefore no ſettlement.

Per Curiam, Order of ſeſſions confirmed.

Courthope and *Bowen* were in ſupport of the order of ſeſſions.

Friday, June 25th.

The KING *againſt* J. P. HEYWOOD Eſq. and Another.

The 13 G. 1. c. 23. ſ. 5. for ſettling "diſputes between clothiers or makers of woollen goods, and weavers, or perſons employed in ſuch manufactures," does not relate to demands againſt clothiers by the owner of a ſcribbling and carding mill for work done by him for the clothiers in teaſing, ſcribbling, carding, and ſtubbing the wool at his mill: therefore the Court refuſed a mandamus to two juſtices to hear and examine ſuch demands.

HOLROYD obtained a rule niſi for a mandamus to the defendants, being juſtices of the Weſt Riding of *Yorkſhire*, commanding them to ſummon four perſons of the names of *Dyſon*, *Wheatley*, *Thornton*, and *Webſter*, and to hear and examine upon oath the demands of one *Joſhua Hirſt* againſt the ſaid four perſons reſpectively, and to adjudge ſuch ſatisfaction and to give ſuch coſts and damages to the party grieved, as in the diſcretion of the ſaid juſtices ſhould ſeem reaſonable, purſuant to the ſtatute 13 G. 1. c. 23. ſ. 5.

This application was founded on the affidavit of *Hirſt*, which ſtated that he applied, at a ſpecial ſeſſions, on the 14th of *May* 1813, to the two juſtices named in the rule, to grant him ſummonſes, in purſuance of the authority given to them by the act, againſt the ſaid four perſons, who were clothiers, for certain debts due to *Hirſt* from them reſpectively, amounting to 91*l.* 16*s.* 8*d.* due from one, and in the whole, to upwards of 140*l.*; that he ſtated to the juſtices that the debts became due to him for work and labour done by him for the ſaid clothiers, at their requeſt, in the courſe of manufacturing woollen cloth, viz. in teaſing, ſcribbling,

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ſcribbling, carding, and ſtubbing their wool at his mill.

In the Weſt Riding of *Yorkſhire* there are a great many large mills called ſcribbling and carding mills, which are filled with machinery for performing that proceſs towards the making of cloth, which the wool undergoes between the time of its coming out of the woolſtaplers hands and its being delivered to the weaver. The clothiers univerſally ſend their wool to theſe mills to undergo the above proceſs, and become indebted to the mill-owners in large ſums of money for the work performed upon it at theſe mills. The work done at the mills is called teaſing, ſcribbling, carding, and ſtubbing; teaſing, or, as it is ſometimes called, wooleying, is done upon a large cylindrical machine, which has a number of iron hooks on the outſide, and being kept in a quick rotatory motion catches the wool which is brought to a proper diſtance, and drags it to pieces. Scribbling is next, which is done by a machine containing a number of rollers covered with cards, that run nearly in contact with each other, and the wool going between them gets a ſecond dreſſing: carding is ſimilar to ſcribbling, the wool gets further dreſſed, and comes out of the machine in long rolls, which are pieced together by children, and afterwards go to be ſtubbed; which is nothing more than ſpinning them ſmaller in a billy, an inſtrument that contains a number of ſpindles turned by the hand, and is then ready for the weaver. In this proceſs a great number of hands are employed in the mills, as many, if not more than were employed under the old ſyſtem, but a vaſt deal more work is done in the ſame time. Formerly the whole work, which is now done at the mills, was performed at the weaver's houſe, the ſcribbling

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bling was done by the hand, upon a ſcribbling box, covered with a coarſe card; the carding was performed on a ſimilar inſtrument but leſs and with finer cards, and the wool was afterwards ſpun upon a ſingle ſpindle, turned by the hand. Whilſt the work was done thus, the weaver was the principal ſervant of the clothier, and the other perſons mentioned in the act to be employed in the manufacture, were his family or his neighbour's children taken into his houſe; for women and children commonly did the work unleſs when the weaver or clothier ſometimes ſcribbled the wool himſelf.

Topping and *Foljambe* now ſhewed cauſe, and made two objections to this application; 1ſt, that the perſon applying was not within that claſs of perſons deſcribed in the 13 *G.* 1. *c.* 23. The object of the legiſlature was to afford a ſummary remedy for the ſettlement of diſputes and demands between the clothiers and makers of woollen goods, and the perſons employed in ſuch manufacture, as their ſervants, by enabling ſuch perſons to enforce their demands upon oath againſt their maſters; but not to extend the remedy to demands between clothiers and maſter-manufacturers, ſuch as the preſent applicant, who never was employed as a ſervant to the clothiers. The preſent demands therefore are nothing leſs than demands between two deſcriptions of maſters. 2dly, The work out of which the demand ariſes is not that deſcription of work which is within the ſtatute; this was not a work done in the proceſs of weaving or in the manufacture of cloth or woollen goods, but in the courſe of a proceſs which appears to be preparatory to that of the weaver; therefore if this perſon can be conſidered within the act, all perſons in any wiſe concerned in

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in the wool trade, as dyers, &c. may bring themſelves within it; whereas it was intended, like the 1 *Ann. ſt.* 2. *c.* 18. *ſ.* 4. for labourers only. The debts demanded are alſo conſiderable, and in caſes like the preſent may frequently ſubſiſt to a much larger amount: it is therefore not very probable that the legiſlature could have intended to withdraw ſuch differences from their proper forum, and ſubject them to the ſummary juriſdiction of the magiſtrates. If left to the ordinary juriſdiction of a jury, the party will not be deprived of his ſet-off; and this being a ſtatute, which ſubſtitutes the oath of the party in lieu of the more regular proceeding of the common law, ought to be conſtrued ſtrictly.

Holroyd and *Scarlett* contrà, referred to the words of the act to ſhew that they were large enough to embrace this caſe. The title of it is "an act for the better regulation of the woollen manufacture, and for preventing diſputes among the perſons *concerned therein*;" and *ſ.* 5. extends not only to clothiers and makers of woollen goods and weavers, but expreſsly to "other perſons employed in ſuch manufactures." This proceſs, as deſcribed in the affidavit, may fairly be conſidered as part of the woollen manufacture; what is done to the wool is in the proceſs towards the manufacture of the cloth, and it is immaterial whether it be done by the hand of the individual or by the machinery of a mill, the mill being only a ſubſtitution for the hand. Here then is a perſon falling within the expreſs terms of the act, being "a perſon employed in the woollen manufacture," and this is a demand "relating to work;" conſequently both come under the juriſdiction of the juſtices. No inconvenience will reſult to the parties grieved from this conſtruction,

becauſe

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becauſe it is at their option whether or not they will ſubject themſelves to this juriſdiction, for it muſt be on the application of the party grieved that ſatisfaction is to be adjudged; beſides the deciſion of the magiſtrates is not final, for ſ. 6 gives an appeal to the quarter ſeſſions. As to depriving the party of the benefit of a ſet-off, that inconvenience would equally ariſe in the caſe of workmen; and it is a miſtake to ſuppoſe that the ſtatute authorizes the juſtices to determine upon the oath of the parties themſelves; it ſays that they ſhall examine upon oath; but it does not ſay that they ſhall examine the parties.

Lord ELLENBOROUGH C. J. The penal proviſions of this act ſhew ſtrongly that it is not applicable to the adjuſtment of debts between parties of equal rank in trade: the perſon who ſhall refuſe, for the ſpace of 10 days, to pay the coſts and damages adjudged againſt him, is liable to be committed to the county gaol or houſe of correction. Looking at the words of the act I do not think they are ſuſceptible of any doubt. The act recites "that diſputes have ariſen between clothiers and makers of woollen goods and the manufacturers employed by them, concerning the admeaſurement and weight by which wool and other materials uſed in making up woollen goods have been delivered out to the workmen employed therein;" the act therefore clearly relates to caſes where parcels of wool have been delivered out to the various workmen, in order to be worked up by them immediately after ſuch delivery. The ſecond ſection provides for the weight by which the wool is to be given out, and alſo for an ulterior proceſs of the manufacture, by providing that the clothier ſhall receive back

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back the ſame by the ſame weight, without fraud or deceit, under a penalty. But how can he receive the ſame back by the ſame weight, in this inſtance, where it appears that by the ſcribbling the weight muſt be materially diminiſhed? What, however, I found my opinion upon, is the very words of the 5th ſection, that "all diſputes and demands relating to work, *wages*, or damages between any clothier or maker of woollen goods, &c., or any weaver or other perſon or perſons employed in ſuch manufacture, ſhall be heard and determined by two or more juſtices of the peace," &c. "Wages," I think, is the emphatical word denominating the character of the perſon who is to apply. There muſt exiſt the relation of a party to pay and a party to receive wages. But there is no pretence for ſaying that any thing under the denomination of wages ſubſiſts between theſe parties. "Wages" relates to the quantum of compenſation, as if ſo much per week or month is agreed to be given for the labour of a perſon; "work" relates to the mode in which the labour is to be performed, as if it is to be done within a ſtipulated time; and "damages" relates to the malperformance of that work, which may form the ſubject of a claim by the maſter againſt the workman; ſo that all theſe are words expreſſing the relation of maſter and ſervant. And this view of the ſtatute ſeems to be confirmed by reference to other acts, and eſpecially the 14 *Geo.* 3. *c.* 25. which makes it an offence puniſhable with impriſonment, if the inferior claſs of workmen there enumerated do not return the implements of their trade entruſted to them by their employers. It appears to me, therefore, that this caſe is not within the comprehenſion of the act of parliament.

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LE BLANC J. The object of this ſtatute was to take thoſe caſes, for which it provides, out of the ordinary juriſdiction of the courts of law, in matters of diſpute between party and party; and to ſubmit them to the conſideration of the magiſtrates to determine in a ſummary way. The Court therefore muſt ſee clearly that this is a caſe which falls within the meaning of the act of parliament. It ſeems to me that there is conſiderable weight in the objection, that the preparing materials for making cloth was not a work within the intention of the legiſlature, when they paſſed this act. But the Court is not called upon to determine on that ground; becauſe it is by no means clear that the legiſlature ever meant to ſubject the diſputes between ſuch parties as theſe to the ſummary juriſdiction of the magiſtrates. At the time when this act paſſed probably the work was done more, in the manner ſtated in the affidavit, by ſervants than it is at preſent: the habits of the trade have taken a different turn ſince that time: then the work was done by ſervants employed immediately under maſter workmen; but the ſame work is now done by maſters employing ſervants under them; ſo that the work is now carried on between maſter and maſter. Upon the whole it appears to me that the Court cannot ſee clearly that theſe perſons are objects within the comprehenſion of the act.

Per Curiam, Rule diſcharged.

Topping applied for coſts, and Lord *Ellenborough* ſaid, that if a party choſe to make an experimental motion on the conſtruction of this act, the magiſtrates ought to have coſts.

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The KING *againſt* The Juſtices of SUSSEX.

Friday, June 25th.

A certiorari to remove an order of ſeſſions confirming an order of removal by two juſtices, muſt be moved for within ſix calendar months after ſuch order of ſeſſions made, and ſix days notice of ſuch motion muſt be given to the juſtices purſuant to 13 *G.* 2. *c.* 18. *ſ.* 5., notwithſtanding the order of ſeſſions was made ſubject to the opinion of this Court on a caſe to be ſtated, which caſe was afterwards ſtated, and ſettled by the juſtices at ſeſſions.

D'OYLY obtained a rule niſi in the laſt term for a certiorari to remove an order of ſeſſions made by the juſtices of *Suſſex*, upon an appeal between the inhabitants of the pariſh of *Billinghurſt* and the inhabitants of the pariſh of *Slinfold*, touching the removal of *James Knight* and his family.

The affidavits on which the rule was obtained ſtated, that the appeal in queſtion had been heard at the laſt *Michaelmas* ſeſſions for the weſtern diviſion of the county of *Suſſex*; when the order of removal was confirmed, ſubject to the opinion of this Court on a caſe to be ſtated. That a caſe had been accordingly drawn by counſel for the pariſh of *Billinghurſt* in *November* laſt; which, however, was not approved of by the ſolicitor for the reſpondent pariſh of *Slinfold*, but although frequent applications were made to him, he would not ſtate his objections. The caſe was afterwards ſettled by the Court at their *Epiphany* ſeſſions, and a copy ſent to the ſolicitor for the reſpondents, and he was again applied to to have the caſe ſet down for argument. This requeſt he refuſed to comply with; but at the ſame time gave the ſolicitors for the appellants to underſtand that they need be under no apprehenſion, as he would conſent to a certiorari iſſuing, without regarding whether the ſix months had expired or not. Under the impreſſion that the certiorari would be conſented to, the uſual notice to the

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juſtices as required by ſtat. 13 *Geo.* 2. *c.* 18. *ſ.* 5. had not been given.

Courthope, in ſhewing cauſe, referred to the ſtatute; by which it is enacted, that "no certiorari ſhall be granted to remove any order, &c., unleſs it be applied for within ſix calendar months next after ſuch order made, and unleſs it be proved that ſix days' notice thereof in writing has been given to the juſtices." Here neither of theſe requiſitions has been complied with; neither the certiorari was applied for within ſix calendar months; nor has ſix days' notice been given to the juſtices. In *Rex* v. *Juſtices of Glamorganſhire* (*a*), and in *R.* v. *Nicholls*, *H.* 25 *Geo.* 3. (*b*), the ſix days' notice was held to mean ſix days before the application for the rule to ſhew cauſe.

D'Oyly being now called upon by the Court to ſupport the rule, admitted that it muſt be governed by the authorities cited, if the ſtatute applied to this caſe; but he endeavoured to ſhew that it did not. The reaſon of the proviſion requiring the ſix days' notice is expreſsly given in the act, viz. to the end that the juſtices may ſhew cauſe, if they ſhall think fit, againſt the granting ſuch certiorari; but after the juſtices themſelves have ſettled the caſe, and thereby expreſſed their deſire to have it brought up, the reaſon does not apply; becauſe it cannot be preſumed that they would now think fit to oppoſe the certiorari. It is clear that the ſtatute does not affect all proceedings: in *Rex* v. *Battams* (*c*) Lord *Kenyon* held

(*a*) 5 *T. R.* 279. (*b*) *Ib.* 281. *n.* (*c*) 2 *Eaſt*, 298.

that

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that it did not apply to the removal of an indictment, but to ſummary proceedings only. Here after the caſe was ſettled below, it could no longer be deemed a ſummary proceeding.

Lord ELLENBOROUGH C. J. The order of removal was in the firſt inſtance a ſummary proceeding; and the order of ſeſſions thereupon was a reviſion of that which was originally a ſummary proceeding. I find nothing in the language of Lord *Kenyon*, on which an argument has been raiſed, to the contrary; it is not applicable to the preſent caſe. Admitting that the magiſtrates may have wiſhed, at the time when they ſettled the caſe, to have it brought up, ſtill there may be reaſons why they might think fit to ſhew cauſe; and unleſs it can be ſhewn that it could ſerve no poſſible end to give them ſix days' notice, we cannot ſo preſume. The ſtatute appears to me imperative.

LE BLANC J. enquired if there was any inſtance of an order being removed upon a caſe reſerved without ſix days' notice.

BAYLEY J. ſaid that he was not aware of any inſtance where a certiorari had been granted, after the expiration of the ſix months, upon a caſe reſerved; and that it was the ſettled practice to give the ſix days' notice.

Per Curiam, Rule diſcharged.

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Saturday, June 26th.

The KING *againſt* The Company of Proprietors of ROCHDALE WATERWORKS.

Where a company were empowered by act of parliament to lay under ground, through the ſtreets of a town, main pipes for the conveyance of water, and the inhabitants with the company's conſent to lay pipes communicating with ſuch main pipes to their houſes, paying to the company a rate for ſuch privilege: Held that the company were rateable to the poor in the pariſh where the main pipes lay in reſpect of thoſe pipes, and the rates paid thereon.

THE Company of proprietors of *Rochdale* Waterworks were rated to the relief of the poor of the townſhip of *Spotland*, in the county of *Lancaſter*, for and in reſpect of the trunks and pipes, and other apparatus for the conveyance of water, belonging to the Company, ſituate and being fixed in the ground, in the townſhip of *Spotland*, and the profits ariſing therefrom within the townſhip. The ſeſſions, upon appeal by the Company, confirmed this rate, ſubject to the opinion of this Court on the following caſe:

By an act paſſed in the 49th year of the king, intituled, "An act for the better ſupplying the inhabitants of the town of *Rochdale* and the neighbourhood with water," the appellants are incorporated and impowered, among other things, to lay under ground, in, through, and along the public ſtreets, and common highways, in the townſhip of *Spotland*, main pipes for the conveyance of water therein; and the act authorizes the inhabitants of the ſaid townſhip, with the conſent of the Company, to lay down leaden or other pipes, communicating with ſuch main pipes, to their reſpective houſes, paying to the Company ſuch rate or rates for ſuch privilege, and water, as ſhall be mutually agreed upon between them. In purſuance of this act divers ſuch main pipes and branches are laid and uſed in the townſhip, and divers of the inhabitants thereof pay ſuch rates as aforeſaid to the ſaid Company. The overſeers of the poor of the ſaid townſhip have made the ſaid aſſeſſment for the relief of the poor, purſuant to the

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ſtatute 43 *Eliz. c.* 2., and have aſſeſſed the Company for the ſaid pipes and rates. The appellants alledge that they are not "occupiers of lands" in the townſhip, within the intent and meaning of the ſtatute.

J. Williams and *Coltman*, in ſupport of the order of ſeſſions, relied on *Rex* v. *The Corporation of Bath* (*a*).

Scarlett contrà, endeavoured to diſtinguiſh this caſe from *Rex* v. *Bath*, becauſe here the Company had no reſervoirs, as in that caſe, upon the land, but a mere licence to carry pipes through the lands of others; which in *Rex* v. *Bath* was not expreſsly held to be ſuch an occupation of land as was rateable in the pariſh where the pipes were laid, though perhaps from the reaſons given in that caſe for holding the corporation not rateable for the whole profits in the pariſh where the reſervoirs lay, it may be inferred that the Court were of opinion that the corporation was rateable in reſpect of the pipes in the other pariſhes. But here again another diſtinction is obſervable; for this act not only authorizes the Company to lay main pipes, but the inhabitants alſo to lay pipes communicating to their reſpective dwellings; and it appears that they have done this; ſo that this property ought to be aſſeſſed by rating the inhabitants of each houſe as an occupier of land, pro tanto, according to the extent of the conducting pipe, or in reſpect of his houſe increaſed in value by the ſupply of water.

Lord ELLENBOROUGH C. J. Whether the occupiers of the houſes are or are not rateable in reſpect of the

(*a*) 14 *Eaſt*, 609.

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advantages derived to them from the uſe of theſe collateral pipes, does not affect the preſent queſtion. The queſtion here is, whether the Company, as occupiers of the main pipes, are rateable. What difference does it make whether it be a reſervoir of ſo many feet ſquare, or a pipe of ſo many inches in diameter? I own I cannot diſtinguiſh this caſe from *Rex* v. *The Corporation of Bath.*

LE BLANC J. If this rate on the Company had been ſimply on the leaders which carry the water to each houſe, the argument might have been of weight; but the rate is impoſed in reſpect of the main pipes and the profits ariſing from them.

Per Curiam, Order of ſeſſions confirmed.

Saturday, June 26th.

The KING *againſt* The Inhabitants of WHITLEY LOWER.

Upon appeal againſt an order of removal the declarations of a rated inhabitant of the appellant pariſh are evidence againſt that pariſh, without calling the inhabitant and ſhewing that he refuſed to be examined.

THE court of quarter ſeſſions for the Weſt Riding of *Yorkſhire* diſcharged an order of two juſtices for the removal of *Sarah*, the wife of *John Swallow*, and their children, from the townſhip of *Whitley Lower* to the townſhip of *Emley*, ſubject to the opinion of this Court on the following caſe:

John Swallow, (who is ſince dead) ſerved one *Jagger* as a collier for a year, in the townſhip of *Emley*. To prove the terms of the hiring under which the ſervice had taken place, the counſel for the reſpondents propoſed to give in evidence declarations of *Jagger* the maſter, made in a converſation with the deceaſed (*Swallow*)

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low) about a new hiring; *Jagger* being then and now a rated inhabitant of *Emley*, the appellant townſhip. It was objected on the part of the appellants, that ſuch declarations were not admiſſible, unleſs *Jagger* himſelf was firſt called by the reſpondents, and ſhould then refuſe to be examined, or ſhould be proved to have previouſly refuſed to give evidence. The ſeſſions allowed the objection.

Holroyd and *Stavely*, in ſupport of the order of ſeſſions, admitted that in *Rex* v. *Hardwick* (*a*), the declarations of a rated inhabitant were held admiſſible on the ground of his being a party to the ſuit; but they obſerved that there it appeared that the party had refuſed to be examined; non conſtat, but that if this party had been called he might have given the evidence required.

Lord ELLENBOROUGH C. J. If the argument be good for any thing it muſt apply generally, and it would then be an univerſal rule that the party muſt be called, before his declarations can be admitted in evidence. All the rated pariſhioners are conſidered as parties to the appeal, and therefore their declarations are evidence; if what they have ſaid is mere idle converſation it will have but little weight.

The Court quaſhed the order of ſeſſions, and remitted the caſe back to be re-heard and the evidence received.

Scarlett was againſt the order of ſeſſions.

(*a*) 11 *Eaſt*, 578.

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Tuesday, June 29th.

RIMMER *againſt* GREEN.

Bail attending to juſtify are entitled to protection from arreſt on meſne proceſs.

READER ſhewed cauſe againſt a rule for diſcharging the defendant out of cuſtody of the ſheriff of *Middleſex* as to this action, he having been arreſted during his attendance in court to juſtify as bail in a cauſe depending in this court. The affidavit ſtated that he attended to juſtify and did juſtify; and that during his attendance and before he was called in to juſtify he was arreſted on the ſtairs leading to the court, at the ſuit of the plaintiff.

It was admitted that if the caſe of *Meekins* v. *Smith* (*a*), on which the rule was obtained, could not be diſputed, that the rule muſt be abſolute; and the Court declared that they recognized that caſe, and made the rule abſolute upon an undertaking of the defendant not to bring any action.

(*a*) 1 *H. Bl.* 636.

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PITT *againſt* DONOVAN.

Tueſday, June 29th.

In an action for ſlander of title conveyed in a letter, to a perſon about to purchaſe the eſtate of plaintiff, imputing inſanity to *Y.*, from whom the plaintiff purchaſed it and that the title would therefore be diſputed, per quod the perſon refuſed to complete the purchaſe: Held that the defendant, who had married the ſiſter of *Y.*, who was heir at law to her brother, in the event of his dying without iſſue, was not to be conſidered as a mere ſtranger; and that the queſtion for the jury was not whether they were ſatisfied as men of good ſenſe and good underſtanding that *Y.* was inſane, or that the defendant entertained a perſuaſion that he was inſane, upon ſuch grounds as would have perſuaded a man of ſound ſenſe and knowledge of buſineſs; but whether he acted bonâ fide in the communication which he made, believing it to be true, as he judged according to his own underſtanding, and under ſuch impreſſions as his ſituation and character were likely to beget.

ACTION for ſlander of title. The plaintiff declared in the firſt count, that he was ſeiſed of and intereſted in certain lands, &c. at *Bromeſberrow*, in the county of *Glouceſter*, for the life of *W. H. Y.*, ſubject to certain mortgages and terms of years, and alſo ſeiſed of and entitled to the reverſion in fee of the ſame premiſes, ſubject to an annuity of 500*l.* to the wife of *W. H. Y.* for life, in caſe ſhe ſurvived her huſband, and to a term of years to ſecure the ſame, and ſubject alſo to certain limitations in truſt for the benefit of ſuch children of *W. H. Y.* and his ſaid wife as they ſhould by deed appoint, &c., and that *W. H. Y.* and his wife had no children living, and that the plaintiff was ſo intereſted under and by virtue of a ſale made to him of ſuch lands by the ſaid *W. H. Y.*; that the plaintiff had contracted with one *Barton* to ſell and convey to him ſuch lands, &c. for 30,000*l.*, and that *Barton* was willing to accept the title of the plaintiff and to complete the contract, but that the defendant knowing the premiſes, but unlawfully and maliciouſly deviſing and intending to ſcandalize the right and title of the plaintiff to ſuch lands, &c. and to hinder and prejudice him in the ſale, and to deter and prevent *Barton* from completing the contract, unlawfully and maliciouſly wrote and publiſhed certain falſe, ſcandalous, and malicious libels of and concerning the right and title of the plaintiff to the lands, (that is to

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say) one dated the 18th of *December* 1812, in the form of a letter to *Barton*, to the tenor following;

" Sir,

" I understand you have become the purchaser of the estates of *W. H. Y.* Esq., at *Bromesberrow*, in the county of *Glouceſter*. I cannot but presume that the candour as well as justice of Mr. *Pitt*, of *Cirenceſter*, of whom you have purchased them, has induced him to inform you that I have given him notice, in writing, that his title to those estates will hereafter sooner or later be contested. I am a trustee of those estates for certain purposes, and it is my duty to inform you that at the time they were sold Mr. *Y.* was not in a state of soundness and competency to enable him to do so; and that the sale itself was conducted under circumstances so mysterious and extraordinary as to require an explanation in a court of justice. (Signed) " *R. Donovan.*"

The count then set out another libel written and published by the defendant on the 30th of *December* to the tenor following; " Without following the subject more minutely I will venture to say that I have it in my power to prove a thousand acts of decided insanity in his (meaning the said *W. H. Y.*'s) case, on which neither you nor Mr. *Barton* would have a shade of doubt." There were other counts varying these charges, and the declaration concluded " by reason of which said several premises the plaintiff hath been and is delayed, injured, and prejudiced in the sale of the said lands, &c. to *Barton*, and hath been delayed and hindered in and from receiving divers large sums of money from *Barton* for the same, and *Barton* hath been and is deterred and prevented from carrying into effect and completing the treaty of sale between himself and the plaintiff, which he intended

intended to do and otherwiſe would have done." Plea general iſſue.

At the trial before *Graham* B. at the laſt *Lent* aſſizes for the county of *Glouceſter*, the material allegations in the declaration were proved, as to the plaintiff's title, the contract entered into with *Barton* for the ſale of this eſtate, and the publication of the two writings charged to be libels, the latter of which was an extract of a letter written to *Barton*'s ſolicitor; and it was proved that in conſequence of the receipt of theſe letters *Barton* declined the purchaſe. It further appeared that the plaintiff and the defendant were both gentlemen reſiding in the county; that the defendant, who was a barriſter, but had retired from the profeſſion, was a truſtee under the marriage ſettlement of Mr. *W. H. Y.*, and had married his ſiſter; that under the marriage ſettlement a term of years in this eſtate was veſted in the defendant as truſtee for ſecuring to Mrs. *Y.* her jointure, and that the defendant's wife was heir at law to her brother *Y.* in the event of his dying without iſſue.

The reſt of the evidence was addreſſed to an inquiry into the ſanity of Mr. *W. H. Y.*; the evidence on the part of the plaintiff, conſiſting of a detail of family and other tranſactions, in which that gentleman had been engaged ſince the period of his coming of age, about the year 1799, all tending to ſhew him competent to the management of his affairs; and general evidence was given of his ſanity, by the examination of perſons who were acquainted with him, as to their judgment upon that ſubject; who proved, however, at the ſame time, that he was a man of a diſpoſition and habits of life moſt eccentric. It was alſo proved that the defendant himſelf had, on a variety of occaſions, commencing about

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about 1803, and continuing down to 1807, been engaged for Mr. *Y.* in drawing, ſettling, and ingroſſing his leaſes to the tenants, and atteſting their execution. This was met, on the part of the defendant, by proof of a multitude of extravagances and eccentricities committed by Mr. *Y.* from his youth up, both in the common and the more ſerious concerns of life, tending to ſhew that there was enough to juſtify a ſuſpicion at leaſt of his want of ſound intellect, and there was evidence that ſome members of Mr. *Y.*'s family had been affected with inſanity, and had died under that diſorder, and witneſſes alſo ſpoke to their judgment of his incompetency. After an inveſtigation of many hours the learned Judge left the queſtion to the jury upon the evidence, ſtating to them, in the courſe of his ſumming up, that in order to maintain the action ſome malice muſt be fixed on the defendant, that is, the action muſt be injurious and proceeding from an improper motive; that if the evidence ſatisfied them, as men of good ſenſe and good underſtanding, that Mr. *Y.* was inſane, or if the defendant entertained a perſuaſion that he was inſane upon ſuch grounds as would have perſuaded a man of ſound ſenſe and knowledge of buſineſs, then the defendant would be entitled to a verdict.

The jury found a verdict for the plaintiff, damages 40*s.*; whereupon a rule niſi was obtained in the laſt term for a new trial, on the ground of a miſdirection.

Dauncey, *Abbott*, and *Puller* now ſhewed cauſe, and contended, upon the report, that the facts and circumſtances diſcloſed in it warranted the verdict, and therefore there could not be any reaſon, in juſtice, for diſturbing it; that the defendant was not within the rule

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laid down in Sir *G. Gerard* v. *Dickenſon* (*a*) that a party ſhall be protected in what he ſays of the title of another, provided he himſelf lays claim to the ſame; becauſe here the defendant, though a truſtee for ſome purpoſes to this eſtate, was in the legal ſenſe a mere ſtranger to it, and therefore ſhall have no more protection than a mere ſtranger. And according to *Hargrave* v. *Le Breton* (*b*), and *Smith* v. *Spooner* (*c*), it ſeems that the plaintiff muſt prove malice; but that ſuch malice may be implied, where the words ſpoken or written are untrue, and where the ſpeaker or writer claims no title. As to the miſdirection, the ſubſtance of the iſſue was correctly ſtated to the jury, though perhaps every obſervation may not have been critically correct; what was ſtated as to the malice, was correct; and as to the reſt, it cannot be contended that the law will allow the defendant to make a communication that is injurious to another, unleſs he ſhall at leaſt ſatisfy the jury that he believed the communication to be true; and the ſubſtance of the direction upon this point was, whether a man of ſenſe and diſcretion, ſuch as the defendant muſt be taken to be, could really be ſuppoſed to believe it.

The Attorney-General, *Jervis*, and *W. E. Taunton*, contrà, were ſtopped by the Court.

Lord ELLENBOROUGH C. J. I think there is no neceſſity for troubling the other ſide on this occaſion, for in this matter I cannot help thinking that the point which was peculiarly for the conſideration of the jury, and on the event of which this caſe ought to depend,

(*a*) 4 *Rep.* 18. (*b*) 4 *Burr.* 2422. (*c*) 3 *Taunt.* 246.

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was not left to them correctly, and that it ought, therefore, to be presented to the consideration of another jury; and that point is, whether the defendant made the statement bonâ fide, and under an honest impression of its being the truth, or whether he made it maliciously, and for the purpose of slandering the title of the person that was about to convey his estate. Now that has not been precisely and simply stated to the jury; and really under such a mass of evidence, and after a contention between the parties of so many hours, on the one side, that the sanity of the person was complete, as if the issue had been on a devisavit vel non, and on the other, that the defendant had probable cause for believing what he stated, which was not strictly the issue, I am not surprised that the learned Judge's attention, distracted between the two, was less correct than it otherwise would have been; and particularly under such fatigue of body, which sometimes impairs the mind, and prevents it from fully discharging its duty and exerting its energy; so that the very point on which alone this question turned, was not presented to the jury by the learned Judge as it ought to have been. He has given us the terms on which he left it to them, "that they were to consider the question and to judge on the whole of the evidence."—No doubt of that.—"That the git of the action was malice."—Undoubtedly it was so.—"Not malice in the worst sense, but it was enough that the act done was wrongful, and done under circumstances that marked an intention to do an injury; and that would depend, not on the circumstance, whether he believed it to be true, but whether his belief was such as a man of sound mind, or a man of sense and knowledge of business would have formed."

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formed." Now that is what he was not justified in saying, for with reference to the competency or incompetency of Mr. *Y.*, certainly the question in this cause does not depend on that; for if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious of judgments, yet if he exercised that judgment bonâ fide, it will be a justification to him in this case. Whether his belief be such as a man of sound sense and knowledge of business would have formed is not the question; the opinion which a rational man would have formed on such a subject might be that Mr. *Y.* was competent; but the jury must arrive at their conclusion in this case, through the medium of malice or no malice in the defendant. In that way it might have been left to them, not if you think that no man of a rational understanding would come to such a conclusion, but you will say whether you think this defendant, with such an understanding as he possesses, did bonâ fide arrive at the conclusion which he has stated, or whether he did not use it as a mere pretence, colour, and cloak for his malice. That would have been the way, without putting it on the rationality of the defendant's conclusion; because, from the latter mode of considering it, the jury might have been led to say to themselves, we do not believe, as men of rationality and ordinary understanding, that this person was insane; and taking the defendant to be a man of rationality also, we therefore think he must have been actuated by malice. This might have prevented them from drawing any other conclusion; whereas the learned Judge ought to have embodied in his proposition to the jury, whether under all the circumstances the defendant acted bonâ fide,

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considering the prejudice, the paſſion, the eagerneſs to complain, and the character and ſituation of this defendant. I am aware there were circumſtances in the antecedent conduct of the defendant fit to be left to the jury, from which they might have inferred malice; his acting in the execution of deeds and the like, at a former period of his life, with this gentleman, might have been ſtrong evidence as to whether the defendant believed him to be inſane; but that was not the queſtion left to the jury ſpecifically, but whether a man of ſound mind and knowledge of buſineſs would have formed the concluſion which the defendant formed. And this was not the accidental expreſſion of the learned Judge, but he repeats in the very laſt ſentence to the jury, that they were to ſay from the whole evidence if they thought a man of ſenſe could ſeriouſly believe Mr. *Y.* to be inſane, or incapable of tranſacting buſineſs. Now that is not the way to put the queſtion; for it is moſt important that it ſhould be underſtood that this defendant, who was connected with the property of this gentleman, and was in the expectation, and probably entertained ſome hopes of ſeeing it realized, that his family would ſucceed to the eſtate, for if Mr. *Y.* died without children the eſtate would come to the defendant's wife, and therefore he was intereſted in ſeeing that his family was not cut off by any improper act or contract of this perſon; it is moſt important, I ſay, under theſe circumſtances, that the defendant ſhould have a right to correſpond with the party who was about to become a purchaſer, and have free liberty of ſtating difficulties and propounding his objections to the title, as in the caſe of *Gerard* v. *Dickenſon* and other caſes not ſtronger than the preſent; a liberty which is not allowed to a

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mere ſtranger, according to the rule in *Jenk. Cent.* rei immiſcet ſe alienæ (*a*). But it is impoſſible to treat this defendant as a ſtranger: he was indeed a ſtranger as to any veſted intereſt, but he had an intereſt in probable expectation ſo as to induce him to beſtir himſelf and look about leſt an improper conveyance ſhould be made injurious to his right; and whether he thought that ſuch conveyances would or would not be valid when made, he had a right to ſee that they ſhould not ſtand in his way; for even if they were invalid, they might yet be an impediment to him. The queſtion then diſtinctly and ſubſtantively is, whether in the communication which he made he acted bonâ fide. I am aware that there are many things reprehenſible in the letters, but they are no ſlander of the title, if he believed them. They contain diſreſpectful and improper paſſages, ſuch as may perhaps be libellous on the perſon of the party whom they concern, but they are rather a confirmation of his belief that there was an objection exiſting againſt the man on the ground of his incompetency to do the act, and that it was proper to make it to the perſon with whom he was correſponding. I ſhould be very ſorry if it were ſuppoſed from the reſult of this motion, that there is the leaſt imputation on the gentleman who is the plaintiff in this cauſe. There is not any ground for ſaying that he has conducted himſelf with any view to his own intereſt in this tranſaction; on the contrary, he has conducted himſelf rather delicately and nicely. But the queſtion does not turn upon his conduct; and this is a caſe, the deciſion of which is to govern other caſes where the queſtion of ſlander

(*a*) 247. *pl.* 36.

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of title may occur; in which caſe the bona fides of the communication, and not whether a man of rational underſtanding would have done ſo and ſo, is the queſtion to be canvaſſed. A man of intemperate paſſions, or of weak underſtanding, or a man acting under an erroneous impreſſion, may be carried further than a man of more mature judgment; but ſtill he would not be liable to an action of ſlander of this ſort. I am ſure that the vaſt length of time which this cauſe occupied at the trial muſt have produced a fatigue of body and mind which overſhadowed the direction. I have no doubt that if it had been tried in two inſtead of twenty-four hours, the reſult would have been different as to the direction. As it now ſtands, it appears to me, with the higheſt reſpect for the learned Judge, that the caſe was not left correctly to the jury, and that their verdict may have been founded on an improper impreſſion of what was the queſtion for their conſideration.

BAYLEY J. (a) I am of the ſame opinion. It ſeems to me, that the queſtion for the conſideration of the jury was, whether the defendant really believed that which he made the ſubject of his communication. I have no difficulty in ſaying, that the defendant is not to be regarded as a mere ſtranger in this caſe. I think that he had not only a right, but, if he believed it to be true, that he was called upon to make the communication; for if at any ſubſequent time Mr. *Y.* ſhould die without iſſue, and afterwards the defendant ſhould bring an ejectment to try

(a) *Le Blanc* J. had left the court.

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the ſanity of this gentleman, it would afford matter for ſtrong obſervation againſt him, that he had ſuffered *Burton* to complete the purchaſe of this eſtate and to pay his money for it, without communicating to him that his title would be diſputed. I think, therefore, that if the defendant really believed this contract to be void for the want of ſanity in *Y.*, it was not only his right but his duty to make the communication. Then where a perſon who is not to be treated as a mere ſtranger is ſued in an action of this kind, two things are to be made out; firſt, that there is a want of probable cauſe; and ſecondly, that the party who made the communication acted maliciouſly. Now whether a party acted maliciouſly depends upon his own motives and on the view which the jury entertained of the mind of the party himſelf; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of ſome one other perſon; therefore if we refer to a mind that is ſenſible and reaſonable, and which does not judge under the ſame preſſure, as the mind of the perſon in queſtion might do, and make that ſenſible and reaſonable mind the ſtandard by which to judge of the ſtate of mind of the perſon who is under that preſſure, we ſhall be referring to an improper rule to judge by. The queſtion here is not what judgment a ſenſible and reaſonable man would have formed in this caſe, but whether the defendant did or did not entertain the opinion he communicated. I forbear to give any opinion on the weight of evidence, but the ſhort queſtion is, whether the defendant acted bonâ fide. That was the queſtion for the jury to decide, but was not left to them in that form; that is, whether he acted maliciouſly or not. I therefore feel myſelf bound to ſay that there ought to be a new trial.

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DAMPIER J. I am of the ſame opinion. The point on which the queſtion turns has not been preciſely and correctly preſented to the jury. I cannot bring myſelf to view the defendant, when he entered upon this ſubject, in the light of a ſtranger. In all points in which he appears, whether it be in his connection with the family, in his profeſſion, or in his connection with the property, he ſeems to me to be very far from being a ſtranger to Mr. *Y.* or to his eſtate; and therefore he is entitled to that favourable conſtruction of his conduct which a perſon is entitled to by the law of this land, who mixes himſelf in matters in which he has an intereſt. As to the want of probable cauſe, in order to fix the defendant in this action, it muſt be made out not merely by the fact itſelf, but by all the circumſtances of the caſe, that there was ſuch a want of probable cauſe, as would induce a jury to infer that his conduct was founded in malice; that is, ſuch a want of probable cauſe, as that a party in the ſituation of the defendant, muſt be taken to have acted maliciouſly, not merely with a view to his own benefit, but with a view to the detriment of the party who purchaſed this eſtate from Mr. *Y.* Now if it has been left to the jury to ſay whether a perſon of a ſound mind and knowledge of buſineſs would have formed ſuch an opinion as that which the defendant has expreſſed, I am of opinion it has been incorrectly left to them. For where the party complained of has an intereſt, as far as that intereſt goes, it frequently ſubtracts from the judgment, and prevents that cool diſcuſſion which is requiſite for forming a correct judgment, and clouds it with the prejudice which intereſt brings with it. In the firſt place then, the habits and temper of the party are to be conſidered in forming an eſtimate of his judgment; then come,

come, the concern he has with the eſtate; the deſire he has to look to the intereſt of his family; the connection he has had with the party on whoſe ſtate of mind he writes; the frequent opportunities which he has had of judging on that ſubject, and which he may think have given him better means of forming his opinion upon the ſtate of that perſon's mind from the conduct of it, than others can have: theſe are all qualifications of the general propoſition to which this queſtion has been referred, and ſhould have been left to the jury as points for them to conſider; for all theſe, or ſome of theſe, might have operated in making up their judgment of what was paſſing in the mind of the defendant. The queſtion is not what a ſenſible diſpaſſionate man would believe concerning the ſoundneſs of Mr. *Y.*'s intellect; but what a perſon under the influence of thoſe motives which might have governed the conduct of the defendant would have believed; what was the motive which influenced him; whether his conduct was ſuch as warranted the jury in inferring malice. It ſeems to me that the queſtion has not been ſo left to the jury, and therefore has not been left to them as it ought; conſequently there muſt be a new trial.

Rule abſolute.

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Wednesday, June 30th.

The KING *against* ELLIS.

The leſſee of all thoſe fiſhings of the halves and halvendoles, with the appurtenants to the halves due and accuſtomed within the river *Severn*, between certain limits within a manor bordering on the ſaid river, and of all royal fiſhes taken between the ſaid limits, put and wheel fiſhing excepted, under an annual rent, is liable to be rated to the poor for ſuch fiſhery.

THE defendant was rated to the relief of the poor of the pariſh of *Weſtbury*, upon *Severn*, in the county of *Glouceſter*, under the following aſſeſſment:

"*Ellis*, Mr.—for the fiſhery—5*s*."

Againſt which rate he appealed to the quarter ſeſſions, who confirmed the rate, ſubject to the opinion of this Court on the following caſe:

By letters patent, dated the 24th of *September*, 1 *Car.* 1. 1625, under the great ſeal of *England* and the ſeal of the dutchy of *Lancaſter*, and alſo by letters patent under the privy ſeal, his ſaid majeſty did give and grant to *Robert* Lord *Carye*, and *Henry Carye* Knt., ſon and heir apparent of the ſaid *Robert* Lord *Carye*, and their heirs for ever (inter alia), the manor of *Rodley*, in the county of *Glouceſter*, with all its rights, members, and appurtenances, and houſe or court called the *Bury* Court-houſe, within the manor of *Rodley*, and all lands, &c. thereto belonging, *and all that our fiſhery of the halves and halvendoles, with the fiſhings called* Unlawater, *with the appurtenants to the halves due and accuſtomed within the river of* Severn, in the ſaid county of *Glouceſter*, with all royal fiſhes there to be taken, now or late in the tenure or occupation of *Edward Aſhfield* Knt., or his aſſigns, by particular thereof mentioned to be of the yearly rent or value of 11*l.*, which manor and premiſes together are mentioned to be of the rent or value of 48*l.* 10*s.* 7½*d.*, and to be parcel of the lands and poſſeſſions of the dutchy of *Lancaſter*, and all meſſuages, lands, rivers, gulfs, banks, rivulets, pools, waters, watercourſes, aqueducts, fiſheries, fiſhing

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fishing places, &c. within or belonging to the said manor, tenements, hereditaments, and premises, and all rents reserved on demises or grants; to hold of the said king, his heirs and successors, as of his manor of *Enfield*, in the county of *Middlesex*, by fealty only, in free and common socage, rendering the rent of 48*l.* 10*s.* 7¼*d.* into the hands of the receiver-general of the said king, his heirs and successors in the dutchy of *Lancaster* for the time being, at the times and in manner therein mentioned, and further as in the said letters patent is more particularly stated.

By indenture, 22d *November*, 8 *Car.* 1. 1632, *Robert* Earl of *Monmouth*, and *Henry* Lord *Carye*, his son and heir apparent, granted in fee to *John Young* and several others, and their heirs, the said manor of *Rodley*, fisheries and premises, in the said county of *Gloucester*, mentioned in the said letters patent.

By indenture, 26th *June*, 9 *Car.* 1. 1633, the said *Young* and others demised to *Thomas Rush* for 1000 years from the 24th of *June* then last past, *one-fourth part of all those fishings of the halves and halvendoles and of the fishing called* Unlawater, *with the appurtenants to the halves due and accustomed* within the river of *Severn*, in the said county of *Gloucester*, from a certain bay or pill within the manor or lordship of *Rodley*, in the county aforesaid, commonly called *Newnham's Pill*, unto a certain place in the lordship of *Rodley* aforesaid opposite to *Epney's Weare*, in the said county of *Gloucester*, and also a fourth part of all royal fishes to be taken between the said bay or pill and the said place opposite to *Epney's Weare* as aforesaid, *put fishing and wheel fishing in the said river* Severn, *excepted out of this grant*, under the yearly rent of one penny during four years of the said term

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term next enſuing, payable to the ſaid *Young*, his heirs or aſſigns, on a day therein mentioned; and during the reſidue of the ſaid term of 1000 years under the annual rent or ſum of fifty-and-five ſhillings, at the days and in manner therein mentioned.

The appellant, and five other perſons whoſe ſhares he rents, are the owners of the ſaid fourth part of the ſaid fiſhery and premiſes compriſed in the indenture of the 26th *June* 1633 for the remainder of the term of 1000 years, and alſo of the three other 4th parts thereof derivatively from the ſaid *Young* and others for three reſpective terms of 1000 years, and the appellant is the occupier of all the four parts. This fiſhery is in the pariſh of *Weſtbury-upon-Severn*, and tithes from it have been and ſtill continue to be paid to the vicar of *Weſtbury-upon-Severn*. The appellant, and thoſe under whom he claims the fiſhery, have from the time of the demiſe of the reſpective parts thereof, exerciſed the ſole right of fiſhing in the part of the river compriſed in the demiſe, except the put fiſhing and wheel fiſhing, which have been carried on during the ſame period by perſons who rented under *John Colcheſter* Eſq. and others at 1*s*. per putt in the following manner: the putts are ozier baſkets, ſix feet in diameter at the mouth, attached to ſtakes driven into the bed of the river, united by wattle, and which ſtakes are repaired from time to time as they become decayed. All ſorts of fiſh are caught in theſe putts, but chiefly ſmall fiſh, not above two ſalmon in a year. When ſturgeon have happened to be taken in the putts they were always claimed by and taken to Sir *William Guiſe*, the lord of the manor. Theſe putts were deſtroyed about 10 or 11 years ago by the trowmen as a nuſance to the navigation of the river. The appellant

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in the exercise of his right of fishing generally uses nets, which the fishermen land on the beach or bed of the river, varying the situation as the current of the river changes by the shifting of the sand; and sometimes they affix one end of the net to a poll stuck into the bed of the river. Out of flood-mark, at one place opposite the fishery comprised in the demises aforesaid, is a fish-house built by the appellant's grandfather about 32 years ago, on the waste of Sir *William Guise*, as lord of the manor of *Rodley*, and it has been used and occupied ever since by the appellant, and those under whom he claims such fishery, together with the said fishery, for the accommodation of the fishermen whenever the course of the river sets that way, which it has not done for the last two years. Before the above mentioned house was built, those under whom the appellant claims occupied in the same manner another house belonging to one *Hawkins*. The appellant, six or seven years ago, purchased a piece of pasture land adjoining the river *Severn*, in the parish of *Westbury*, which he lets, reserving to himself the right of drying nets there, and his tenant pays the poor rates in respect of the land. In 1799 there was a presentment in the manor court of *Rodley* for a crib erected on the waste of the manor, and running into the river on the part adjoining one of the fisheries belonging to the appellant and the five other persons before stated, so that part of it is overflowed at ordinary tides and the whole at high tides. The appellant does not reside in the parish of *Westbury*. The question for the opinion of the Court is, whether the appellant is liable to be rated to the relief of the poor in respect of the property so occupied by him in the parish of *Westbury* as aforesaid.

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Holroyd and *Abbott*, in support of the order of sessions, contended that he was liable. They argued from the terms of the original grant of *Charles* the 1st, that the soil passed to the grantees, for the reasons, as far as they apply, afterwards urged in support of the same argument upon the grant of 1633; and also because in the original grant the fishery was stated to be in the tenure and occupation of a tenant, which implies something territorial that is capable of occupation, and more than a bare privilege of taking fish; and besides, the deed conveys all the banks, rivulets, fisheries, and fishing places, &c. within the manor. The only question then is, what was intended to be conveyed by the demise for 1000 years made in 1633 to *Rush*, under whom the appellant claims. The lessors, as it has been shewn, were clearly entitled to the soil, and they demise one-fourth part of the fishings of the halves and halvendoles, and of the fishings called *Unlawater* (in the terms of the original grant) under a yearly rent of 1*d.* for the four first years, and of 55*s.* for the remainder of the term. Now it may be observed, in the first place, that the very term "halves and halvendoles," probably denotes a conveyance of the soil. It is a term signifying the right which exists by the custom of the country in the lords of the manor of *Barclay*, and other manors, lying on the *Severn*, that the river usque ad filum aquæ is the common boundary, and parcel of those manors on either side of the river. This right was established upon a trial at bar in the Exchequer, reported by Lord *Hale* (*a*), at which he says he attended, and was thoroughly acquainted with the case, and that it was most satisfactorily made out, "and that the lands are

(*a*) 1 *Ld. Hale de Jure Maris, pars* 1ma. cap. 6. 1 *Hargrave's Law Tracts*, 34.

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enjoyed by the Lord *Barclay* and his farmers quietly and without the leaſt pretence of queſtion to this day." Halves and halvendoles then are words including the ſoil itſelf, i. e. this right of the lord over one half of the ſtream; and therefore the ſoil ſhall paſs by the grant of them. But farther, this is a demiſe of all the fiſhings; and if a man grant all his woods, it paſſes the ſoil (*a*); and ſo it ſeems to be the better opinion, that by the grant of a piſcary, or ſeparalis piſcaria, the ſoil ſhall paſs (*b*), though Lord *Coke* differs from that opinion (*c*). It is true there is an exception out of this grant of put and wheel fiſhing, but nevertheleſs it may be a ſeveral fiſhery; for that does not neceſſarily mean an excluſive fiſhery, but only one over which no other perſon has a co-extenſive right with the grantee: and ſo it was ruled in *Seymour* v. *Lord Courtenay* (*d*); on the other hand, the exception ſhews that the whole intereſt of the grantors in the fiſhery paſſed, ſaving to them this partial uſe in the ſoil of put and wheel fiſhing. But admitting this grant of fiſhery to be in itſelf equivocal as to the paſſing the ſoil, the reſervation of rent makes clear what might otherwiſe have remained doubtful on that head; becauſe a rent neceſſarily imports that there is ſomething manurable out of which it is to iſſue, and to which the party may have recourſe to diſtrain (*e*); which cannot be by the grant of a mere incorporeal right. Another circumſtance, which, according to Lord *Hale*, affords an evidence that the ſoil of the river was parcel of the manor, and conſequently paſſed to the leſſees, is the demiſe of one fourth of all royal fiſhes. Lord *Hale* ſays, "He that hath wreck of

(*a*) *Co. Lit.* 4 *b.*
(*b*) *Plowd.* 134. *a.* 2 *Salk.* 637. per *Holt* C. J. in *Smith* v. *Kemp.*
(*c*) *Co. Lit.* 4 *b.* (*d*) 5 *Burr.* 2814. (*e*) *Co. Lit.* 47. *a.* 144. *a.*

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the ſea, or royal fiſh by preſcription infra manerium, it is a great preſumption that the ſhore is part of the manor, as otherwiſe he could not have them (*a*)." And for the ſame reaſon, if he grant the fiſh to another, the preſumption is that he grants the ſhore alſo. And this is farther evidenced by the manner in which the right has uniformly been exerciſed, which is ſtated to be by landing the nets upon different parts of the beach, and occaſionally affixing the end of the net to a pole ſtuck into the bed of the river. At all events, if it be only doubtful on the face of this grant whether the ſoil paſſed, the rule is that it ſhall be conſtrued moſt beneficially for the grantees; and though the ſoil did not paſs, ſtill it ſeems that if a man grant a fiſhery, or if he grant veſturam or herbagium terræ, the grantee ſhall have a particular right in the land (*b*); and that is enough to ſuſtain this rate.

W. E. Taunton and *Campbell*, contrà, admitted that the ſoil paſſed to the grantees under the deed of 1625, but denied that it did ſo by that of 1633, which was not coextenſive with the former deed. The poſition cited from *Plowd.* is only ſtated arguendo, and with an ut videtur, and it is not warranted by the year-book, 40 *Edw.* 3. f. 44. which is referred to in ſupport of it. No judgment is there ſtated, nor any grant ſet out; and the poſition is admitted to be contrary to the authority of Lord *Coke*. Perhaps to inquire what paſſes by a grant of fiſhery or ſeveral fiſhery, is ſtill vexata quæſtio. In the caſe of the fiſhing of *Bunne* (*c*) it is ſtated, "that the city of *London* had a grant from the crown of the river *Thames*, but becauſe it was conceived

(*a*) *Hale de Jure Maris, pars* 1ma. cap. 6. 1 *Hargrave's Law Tracts*, 27.

(*b*) *Co. Lit.* 4. *b*. (*c*) *Davis*, 56.

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that the ſoil and ground of the river did not paſs by ſuch grant, they purchaſed a new grant including the ſoil and ground of the river." But whatever may be the general import of a grant of fiſhery is foreign to this caſe; becauſe by the exception, out of this grant, of put and wheel fiſhing, the whole ſoil was expreſsly excepted, and reſerved to the grantors, and not a partial uſe only, as contended for on the other ſide. Lord *Hale*, in his treatiſe *de Jure Maris* (*a*), divides fiſhing into two kinds, viz. with the net, which he ſays may be either a liberty without the ſoil, or in concomitance with the ſoil; or otherwiſe it is a local fiſhing that ariſeth from the propriety of the ſoil: ſuch are gurgites, weares, fiſhing places, borachiæ, ſtachiæ, &c. which are the very ſoil itſelf. As to the rule that a rent cannot be reſerved out of an incorporeal inheritance, it muſt be taken with ſome qualification. In *Co. Lit.* 47. *a.* it is ſaid that if it be reſerved on a leaſe by deed for years, it may be good by way of contract to have an action of debt, but diſtrain the leſſor cannot, neither ſhall it paſs with the grant of the reverſion. But this ſeems contrary to *The Dean and Chapter of Windſor* v. *Gover* (*b*), where upon a leaſe of tithes for 21 years, reſerving an annual payment, the Court inclined that it was a rent, which would go with the reverſion. And *Saunders* cited *Dubytofte* v. *Courteene* (*c*), and *Valentine* v. *Denton* (*d*) to the ſame effect; and ſo are the caſes of *Daſton* v. *Reeve* (*e*), and *Tripping* v. *Grocer* (*f*). This point, however, received a more ſolemn deciſion in *Balby* v. *Wells* (*g*), in which covenant was held to lie by a rector upon a leaſe for years of tithes againſt the aſſignee of

(*a*) 1 *Harg. Law Tracts*, 18. (*b*) 2 *Saund.* 304.
(*c*) *Cro. Jac.* 453. (*d*) *Ibid.* 111. (*e*) 1 *Ld. Ray.* 77.
(*f*) *Sir T. Ray.* 18. (*g*) 3 *Wilſ.* 25. and *Wilmot's Judgment*, 8. C.

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his lessee. From these cases it seems clear that a rent may be reserved out of an incorporeal hereditament, and that it will go along with the reversion; therefore the conclusion, that because a rent is here reserved, the soil must of necessity be taken to pass, is by no means a correct one. As to the royal fish, according to Lord *Hale* (a), this perquisite may be had in gross as well as appurtenant to a manor; and here the presumption is, that it was in gross, because the lord of the manor always claimed and took the sturgeon, which indicates that he was owner of the soil. The exposition of the term "halves and halvendoles" is ingenious, but it probably means nothing more than a designatio loci within the river where the fishery lay. But it is said that the enjoyment under this grant by using the banks and bed of the river is evidence of the right; which is not denied; but the question is what right; whether an absolute dominion in the soil, or only that right which is the more natural, and is incident to every grant, viz. that of using whatever is necessary for the enjoyment of the thing granted, according to the maxim quando lex aliquid alicui concedit, concedere videtur & id, sine quo res ipsa esse non potest (b). Therefore if one grant all his trees growing in his woods the grantee may cut them down, and carry them through the land, for without this the grantee cannot have them, nor make a profit of them. So if one sell all his fishes in his pond, the vendee may well justify for the coming to the banks to fish, for without this he cannot take them by any means (c). In like manner the exercise in this case is referable to the right incident to the principal thing, without which the party could not have it, and not to the

(a) 1 *Hargrave's Law Tracts*, 44.
(b) *Co. Lit.* 56. *a.* 153. *a.*
(c) *Plowd.* 16.

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thing itſelf. It is in the nature of an eaſement in the ſoil of another, which like the waggon way in *Rex* v. *Jelliffe* (*a*) is not rateable. Upon the whole therefore it is ſubmitted that there is no reaſon for holding that the ſoil paſſed by the leaſe of 1633.

Lord ELLENBOROUGH C. J. This caſe has been argued with great induſtry and learning; and the Court cannot but feel obliged to the gentlemen who have argued it, for the pains which has produced ſo much learning; but after all, I confeſs my opinion remains much the ſame as it was at the concluſion of the argument in ſupport of the rate. The rate has been confirmed by the ſeſſions; we muſt therefore ſee that they have done wrong, before we determine that their adjudication ought to be quaſhed. I will not aſſume that a fiſhery, as an incorporeal hereditament, is the ſubject of a rate. The queſtion then is, whether there be any land connected with this fiſhery ſo as to be the ſubject of rate. What is the thing granted? In 1625 the king grants "all that our fiſhery of the halves and halvendoles with the fiſhings called *Unlawater*, with the appurtenances to the halves due and accuſtomed." I could have wiſhed that the ſeſſions had explained to us, if any lights were afforded by the evidence, the meaning of the term "halves and halvendoles," which is not very familiar to us. It has been treated in argument as if it related to half of the river, and the grant being "with the appurtenants to the halves due and accuſtomed," is in favour of the conſtruction of the half ad filum aquæ; which according to Lord *Hale* belongs by the conſtant cuſtom of that country to the lords of the

(*a*) 2 *T. R.* 90.

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manors on either side the river; in support of which cuſtom he cites the lord *Barclay's* caſe. The caſe is an extremely curious one, not only as comprehending a cuſtom affecting a whole diſtrict of manors, but as it ſhews in what view evidence in ſupport of ſuch a cuſtom, as it was admitted in the Ducheſs of *Somerſet's* caſe (*a*) and other caſes, ought to be received. I have always thought that this caſe of Lord *Hale* threw light upon the nature of this evidence, and ſhewed that it is to be conſidered rather as evidence of a cuſtom pervading one common diſtrict of manors, than as the cuſtom of one manor to ſhew the cuſtom of another. Perhaps therefore if this cuſtom be adverted to, it may explain a little the meaning of the term halves and halvendoles; but whatever its meaning may be, I think from the grant of "the fiſhings with the appurtenants to the halves due and accuſtomed," it appears diſtinctly that theſe halves and halvendoles are of the nature of land, or ſome local limit within which the fiſhery connected with the ſoil is to be exerciſed. I cannot conſider it otherwiſe than as a grant of ſomething territorial. There are alſo theſe farther words, "all royal fiſhes there to be taken." The like expreſſions occur in the ſecond grant; from all which an argument has been drawn from Lord *Hale's* treatiſe, who ſpeaks of it as a great preſumption that the ſhore is parcel of ſuch manors as by preſcription have royal fiſh, otherwiſe they could not have them: and it is argued that here the grant of the one thing leads to a neceſſary implication of the grant of the other, by which alone the thing can be conveniently exerciſed. Such is the argument, and it is certainly one of powerful in-

(*a*) 1 *Str.* 659. 3d point. See alſo *Dean and Chapter of Ely* v. *Warren*, 2 *Atk.* 189. *Stanley* v. *White*, 14 *Eaſt*, 341.

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ference. I rely less on the rent reserved, which, however seems more applicable to a corporeal than an incorporeal hereditament, because there has been some controversy on that point. It is contended on the other hand, that as the put fishing and wheel fishing are excepted out of the grant, and as these can only be enjoyed by means of posts and stakes affixed to the soil, therefore no right of soil passed to the grantee, the soil being for this purpose excepted out of the grant. I should, however, derive from this exception an argument of a different kind, viz. that all that is not taken away by it passes by the grant. The terms on which the put and wheel fishing is excepted to the grantors are not particularly stated; it no doubt appears to give them a right of using the soil for that purpose; but it does not appear to repel the general right to the soil arising from the grant of the halves and halvendoles, &c. I do not found my opinion on this being a sole right of fishery, or coming within any particular description of fishery under which the soil must pass; but I think that under the circumstances we ought not to quash the order of sessions, unless we are satisfied that the sessions could not, upon any reasonable ground, conclude that by this grant of halves and halvendoles, &c. some territorial right was conveyed.

Le Blanc J. This is an application to quash an order of sessions; and we must determine before we make the rule absolute, that the court of quarter sessions have acted wrong upon the facts disclosed to us by this case. It appears, from what has been said at the bar, that this is the most perfect statement of the case which the sessions are able to make, and upon this case

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they have confirmed the rate. The caſe, as far as reſpects the property rated, merely ſtates that the appellant is rated "for the fiſhery." It muſt be taken, however, to mean the fiſhery mentioned in the caſe; and then we are to collect from the ſtatement what ſort of fiſhery this is, in order to ſee whether it is in any manner connected with the ſoil. In determining this I ſhould be inclined to reſt very much on that which is ſtated at the cloſe of the caſe, viz. that the appellant uſes nets, which the fiſhermen lay upon the beach or bed of the river, and that ſometimes they affix one end of the net to a pole ſtuck into the bed of the river. But we muſt alſo refer to the grants. It is clear, I think, that by the original grant there is a conveyance of the right of ſoil, or a territorial right. The grant is of "all that our fiſhery of the halves and halvendoles, with the fiſhings, with the appurtenants to the halves due and accuſtomed within the river *Severn*, with all royal fiſhes." Such is the original grant. The derivative grant of 1633 is for a term of years of one fourth part of all thoſe fiſhings of the halves and halvendoles, and of the fiſhings, with the appurtenants to the halves due and accuſtomed within the river *Severn*; not giving ſo extenſive a right as the original grantees had, but giving the fiſhery in the terms which I have ſtated. The ſeſſions have not ſtated what is meant by the halves and halvendoles; whether a particular ſpot in the river, or a deſcription of land, or a certain portion of the fiſhery. We are left to collect that from the caſe as ſtated. I profeſs myſelf at a loſs to underſtand the meaning of theſe terms except as far as it may be collected from the ſubſequent ſtatement of what the appellant has enjoyed. It is ſtated that he has been regularly

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in the enjoyment of the fiſhery between the two termini mentioned in the demiſe, varying the ſituation as the current of the river changed, and that he has occaſionally uſed the bed of the river; but it does not appear that any right granted to him by the conveyance of 1632 [illegible] under the words "halves and halvendoles." There is, however, a grant of royal fiſh, which it has been contended, is a great preſumption that the ſoil paſſed, becauſe it is a ſort of right appurtenant to the ſoil. That right the appellant enjoys with the exception of put and wheel fiſhing, and the royal fiſh annexed thereto. How far the exception leads to any inference as to the extent of the right reſerved to the grantors, it is unneceſſary to conſider. They had the whole of the fiſhings, as well that with nets as the wheel and put fiſhing, at the time of the grant, and might have granted the whole independently of the ſoil, or might have portioned out the right of fiſhing with the ſoil, reſerving another portion with the ſoil to that extent. Under an ignorance of the meaning of the terms, "halves and halvendoles," when we ſee that the appellant has been in the conſtant exerciſe of landing nets on the ſhore and fixing them to poles in the bed of the river, it is impoſſible to ſay that the ſeſſions have done wrong in making this rate on the appellant, as having a right to the ſoil.

BAYLEY J. I am of the ſame opinion. In order to be rateable the party muſt be the occupier of land; a mere incorporeal fiſhery does not fall within the ſtat. 43 *Eliz.* as the ſubject of rate. The queſtion then is whether we may conſider the appellant as the occupier of land. The ſeſſions have confirmed the rate, and

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they were the proper persons to draw a conclusion from the evidence, if any could be drawn; and if enough is stated to support their conclusion, that is sufficient. It is stated by Lord *Hale* that a fishery may be either unconnected with the soil, or may be connected with it. I should doubt very much if the grant of a fishery would convey the soil and every thing underneath it, such as all the minerals, though I can conceive that it may pass so much of the soil as is connected with the fishery. It is admitted that by the grant of 1625 the soil passed to the grantees. In 1633 one-fourth part of the halves and halvendoles was granted to *Rush* from whom the appellant derives title, and subsequently the whole vested in the appellant. In order to form a judgment whether this was a grant of a mere incorporeal hereditament or not, we must look at the terms of the grant, and in what manner the grantee has from time to time exercised the thing granted. Now it appears that he has exercised, not merely the right of fishing, but of landing his nets on the beach or any part of the bed of the river wherever he thought fit; and he also has been used to drive stakes into the ground for the purpose of affixing his net to them. There is, however, no privilege granted by the deed to use the beach or bed of the river for any such purpose, there is none at least granted in express terms. But it is said that it would pass as incident to the grant; and if it were necessary to the exercise, it might and would pass as incident; but to say that it would pass is begging the question, because it is assuming that it is necessary; but of that the sessions were the proper judges. There are many instances of these rights of fishery being exercised without landing the nets on the beach or bed of the river, or

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driving poles into the ground; such as the fisheries in the *Thames*, the *Southampton* and other rivers, which are carried on by means of boats alone for that purpose. Therefore it is not a necessary incident to such a right as this, that the party should have the privilege of landing nets on the beach or of driving stakes. If then this be not an incidental privilege, nor one which is granted in express terms, to what else can the exercise be referred, except to its being a grant of a fishery of such a nature as conveyed at least the surface of the soil? I do not lay much stress on the exception of the put and wheel fishing in favour of the grantors, which would equally interfere with the right of the grantee, whether his right was an incorporeal one or not. It was therefore only meant by such exception to reserve to the grantors the right of putting down puts and wheels without being liable to an action for so doing, and to restrain the grantee from doing it. If the use of puts and wheels was a common mode of exercising such a fishery, it would have passed to the grantee unless it had been excepted; it might therefore be excepted on that account. On the other ground however it seems to me, that the sessions were warranted in drawing the conclusion they have done. It was thrown out in the course of the argument that a waggon-way was held not rateable. But when that question comes to be examined it will be found that *Rex* v. *Jolliffe* does not authorize a position so general. There the person who was rated was not the occupier of the way-leaves, but only used them by the consent of another, who was the occupier; therefore that case does not conclude the question.

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DAMPIER J. The facts are not so fully stated as might be wished, but it is said that the sessions are not able to give us any fuller information, and therefore we must decide upon the facts as they stand. I do not think that the sessions have done wrong. It is very properly admitted that the soil passed under the first grant, the words of that grant are large enough to carry it, and the exercise of the right shews it. It does not appear that any severance of the soil and fishery took place in the interval between the first and second grant; the words of the second grant are to be taken as strong against the grantors as their sense will admit, and they are sufficient to pass the soil, unless such a construction be negatived by the exercise of the right, which so far from negativing confirms it. There are other circumstances tending to the same conclusion; a rent is reserved. a rent indeed may be reserved out of, or more correctly speaking, in respect of an incorporeal hereditament, but the question here is whether this is not a reservation which does not merely lie in grant or covenant, but also in debt. Another circumstance shews that the soil did pass. It is not stated, nor does it appear whether put and wheel fishing was a subsisting mode of fishing at the time of the second grant, or whether it originated with the reservation; but the reservation of a partial interest in the soil shews that the parties contemplated that the whole would otherwise have passed. Then the exercise of the right has been by drawing the nets on the soil, as to which it is argued that it may be referred either to a right of soil or easement upon it. Certainly it may be so, and if the sessions had found it to be an easement, that might have made a difference; but they have not so found, and it seems to me in the absence of other evi-

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dence, rather to be referable to the right of ſoil. It ſeems then that the words of the grant are ſufficient to paſs the ſoil, the exception ſhews that the wheel and put fiſhery would have paſſed it, if it had not been excepted, and the exerciſe concurs to ſhew that the ſoil did paſs.

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Order of ſeſſions confirmed.

The KING *againſt* The Inhabitants of the Townſhip of THWAITES.

Wedneſday, June 30th.

UPON an appeal againſt an order of two juſtices, for the removal of *John Huddleſton*, his wife and children, from *Harrington* to *Thwaites*, both in the county of *Cumberland*, the court of quarter ſeſſions confirmed the order, ſubject to the opinion of this Court on the following caſe;

A pariſh certificate granted to *T. C.* and *J.* his wife, engaging to receive them, *their child or children born or to be born*, only extends to a ſon, born at the time of granting the certificate, ſo long as he continues a part of his father's family; therefore where the ſon married, and reſided with his family apart from his father, in the certified pariſh: Held that his apprentice gained a ſettlement by ſerving him in the ſaid pariſh.

The pauper, *Huddleſton*, was born in *Thwaites*, but was afterwards regularly bound apprentice to one *R. Caſs*, in the townſhip of *Brigham*, and duly ſerved and reſided his whole time (ſeven years) in the ſaid townſhip. *T. Caſs* the father of *R. Caſs*, reſided at *Brigham* under a certificate from the churchwarden and overſeers of the townſhip of *Sunderland*, which had been delivered to the pariſh officers of *Brigham*, acknowledging "the "ſaid *T. Caſs* and *Jane* his wife to be legally ſettled "within their townſhip, and that as ſuch they did there- "by promiſe and engage for themſelves and ſucceſſors, "churchwarden and overſeers, to receive them the ſaid "*T. Caſs* and *Jane* his wife, *their child or children born or* "*to be born* in their ſaid townſhip as perſons legally "ſettled whenever they or any of them ſhould become "chargeable,

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"chargeable, or upon any other occaſion whatſoever." *R. Caſs*, the pauper's maſter, was born at the time of the certificate ſo granted and delivered; and during the time of the pauper's ſerving him was a married man reſiding with his family in the townſhip of *Brigham*, apart from his father; but it did not appear that he had gained any ſettlement there.

The queſtion for the opinion of the Court is whether the pauper gained a ſettlement in *Brigham* by ſuch ſervice and reſidence with *T. Caſs*.

Fell and *G. Lamb*, in ſupport of the order of ſeſſions, contended that he did not, inaſmuch as *R. Caſs* the ſon, by reaſon of his being under the protection of the certificate, was not in a condition to enable a perſon to gain a ſettlement by ſerving him as an apprentice. A child may be virtually included in a certificate granted to the father, though not named; according to *Rex* v. *Sherborne* (*a*), and *Rex* v. *Bray* (*b*): and according to *Rex* v. *Hampton* (*c*), *Rex* v. *Alfreton* (*d*), and *Rex* v. *Sotterby* (*e*), the wife or child, though not named, remain part of the perſon's family to whom the certificate is granted after his death. Then what difference is there in point of law whether the ſeparation be cauſed by the act of the party or by the act of God? It is true that in *Rex* v. *Heath* (*f*), and *Rex* v. *Mortlake* (*g*), it was ruled that a child, where he is not named, may by his own act ſeparate himſelf from his father's family, and become thereby diſcharged from the certificate; but *Rex* v. *Sotterby* has decided that the carrying on buſineſs for himſelf is not

(*a*) *Burr.* S. C. 181. (*b*) *Ibid.* 259. (*c*) 5 *T. R.* 266.
(*d*) 7 *T. R.* 471. (*e*) 2 *Eaſt*, 276. (*f*) 5 *T. R.* 583.
(*g*) 6 *Eaſt*, 357.

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such an act as will work a discharge. And on the other hand *Rex* v. *Testerton* (*a*), and *Rex* v. *Bath Easton* (*b*) shew that if the children be named in the certificate, they are still protected by it, though they separate and become distinct from the father's family. Now whether they be inserted nominatim, or described in the certificate in such adequate terms as clearly designate them to be objects of the certificate, must be the same thing in effect; and here *R. Cass*, the son, who it appears was born when the certificate was granted, is as clearly designated by the words "child born" as if he had been named.

Pales and *P. Courtney*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. This appears very clearly to have been a service under an indenture of apprenticeship to a person who at the time was not protected by the certificate, and consequently such a service as coupled with the residence will entitle the pauper to a settlement in *Brigham*. The certificate engages "to receive the father and mother, their child or children born, or to be born." The parish officers perhaps did not know the name of the son, or probably they were ignorant of the fact that they had any son at the time; but it is clear that they meant only to comprehend the whole of the family, with which the parents should migrate. The parents do migrate with their son into another township, and there the son afterwards separates from them, and becomes

(*a*) 5 *T. R.* 258. (*b*) 8 *T. R.* 446.

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himself the head of a distinct family, and so from that time was emancipated. This is a main feature that distinguishes this case from *Rex* v. *Sowerby*, where the party continued to reside with his mother, and brings it within the case of *Rex* v. *Mortlake*, which is also an authority to shew that the pauper by serving the son, under these circumstances, in the certified township will thereby gain a settlement in that township.

Le Blanc J. It seems to be admitted, that this case falls precisely within the determination of *Rex* v. *Mortlake*, unless it can be distinguished upon the terms of the certificate. The circumstance of distinction relied on is this, that the certificate is in its terms an acknowledgment of "the child or children born or to be born;" and this, it has been argued, is the same thing as if the child had been expressly named by its christian name in the certificate. If this were so, there would be an end of the question; for it has been determined, and that determination has never been shaken, that a child named in the certificate stands precisely in the situation of the father, that is, as one of the principals mentioned in the certificate; and therefore if the son had been named in this case, it would follow that a service with him as apprentice would not have conferred a settlement in the certified parish. No case, however, has been cited, and the industry of the learned counsel who have argued this question would probably have discovered one, if any such existed, to shew that any thing less than an express mention of the person by name will have the same effect as naming him; or that describing him by the

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the words "child born or to be born" has ever been held to be equivalent. Where the child is named, there is some reason for saying that he still remains under the protection of the certificate, notwithstanding his complete separation from his family; but the Court will not be disposed at this time of day to extend that doctrine to cases where he only comes under the general denomination of "child born or to be born." If this be so, it seems to me that the case cannot be distinguished from *Rex* v. *Mortlake*. We must then advert to that decision. It was there decided that where the son of a certificated person (he not being named in the certificate, but only falling within it as one of his father's family) quitted the family, and married, and occupied a separate house in the certified parish, he was no longer under the protection of the certificate; but was then in such a situation as gave his apprentice a capacity to gain a settlement by serving him in that parish. This was so decided by reading the conjunction "or" in the words of the stat. 12 *Anne*, "who did come into *or* shall reside in any parish," as copulative. The Court thought that although the son as one of the father's family was once covered by the certificate, yet when he became the head of a distinct family, he no longer continued a person, within the meaning of the statute of *Anne*, with whom an apprentice could not gain a settlement. In *Rex* v. *Sowerby*, the son was residing with his mother after his father's death, although he carried on business for himself: and the continuance under the maternal was considered the same as the paternal roof. The other cases relied on were cases where the child was named in the certificate. The current of all the authorities seems to decide this, that if a person, who is not named in the

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certificate, but only comes within the scope of it as being the child of a person named, abandon the roof of his parents and become himself the parent stock of another family, such person is not only capable of gaining a settlement himself, but also of being the means of others gaining a settlement by service with him; although his father remains protected by the certificate. I am therefore of opinion that the decision of the sessions was wrong.

Bayley J. I am of the same opinion. The provisions of the certificate act seem to place this case in a clear point of view. The statute enacts (a) "that if any person or persons that shall come into any parish or other place there to inhabit and reside, shall deliver to the churchwardens or overseers a certificate under the hands and seals of the churchwardens and overseers of any other parish, township, or place, thereby acknowledging *the person or persons mentioned* in the said *certificate* to be an inhabitant or inhabitants legally settled in that parish, township, or place, every such certificate shall oblige the said parish or place to receive and provide for the *person mentioned* in the said certificate, together with his or her family, whenever they shall happen to become chargeable to the parish, township, or place to which such certificate was given." Therefore if a certificate be granted to a person by name, the parish is bound to provide for him and his family: but if several members of a family be named in it, the parish must provide for each as distinct and separate members unconnected with each other. Who then are the persons named in this

(a) 8 & 9 W. 3. c. 30. s. 1.

certifi-

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certificate whom the township acknowledge as their inhabitants legally settled? The father and mother only; for "their child or children born or to be born" comprehends nothing more than their family; the children are to be received back as part of the family of the father, and not because they are acknowledged as settled inhabitants of the certifying township. In the cases relied upon the certificate not only named the parents but the children also. But where children come within the certificate, merely under the description of the family of the person named, *Rex* v. *Darlington*, *Rex* v. *Heath*, and *Rex* v. *Mortlake* have decided, that they continue under the protection of the certificate so long only as they constitute a part of the family. That is the plain and broad line of distinction.

Per Curiam, Order of Sessions quashed.

PEARSE *against* CAMERON.

Thursday, July 11th.

Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the Court will not give leave to increase the sum in the declaration and rule of reference on an affidavit that a larger sum will probably be proved before the arbitrator.

It seems that under a reference of all matters in difference the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken.

TINDAL moved for a rule nisi for leave to amend the original writ, declaration, nisi prius record, and rule of reference in this cause, by inserting therein the sum of 10,000*l.* instead of 2500*l.*, which was the sum laid in the declaration. The action was brought on a balance of accounts, and at the trial a verdict was taken for the plaintiff for the damages in the declaration, subject to a reference of all matters in difference. The affidavit stated that a much larger sum than that for

which

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which the verdict was taken, would probably be proved before the arbitrator; and assigned as a reason for so small a sum being originally inserted, that the clerk of the plaintiff, who made the affidavit of debt, not having the vouchers before him, could only swear with certainty to 2000*l.*

Lord ELLENBOROUGH C. J. said that the Court could not increase the sum as prayed; that although the arbitrator could not go beyond the sum of 2500*l.* in his award in this action, yet as all matters in difference were referred to him, he might perhaps make his award for a larger sum as to those additional matters referred to him; for which, though the party would not have a remedy under the verdict, he might have a remedy under the award. As far as respected the cause the smallness of the sum might have been an inducement to the other party to submit to the reference.

Per Curiam, Rule refused.

Thursday, July 1st.

CHENOWETH *against* HAY.

Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home: Held that this was an act of bankruptcy within the words of 13 *Eliz.* c. 7. and 1 *J.* 1. c. 15. "otherwise absenting himself to the intent to delay creditors," although it appeared not only that no creditor was delayed, but that none could possibly be delayed.

IN an action against the defendant, late sheriff of *Devonshire*, for a false return to a writ of fieri facias issued against the goods of one *Haley*, tried before *Chambre* J. at the last assizes for that county, the defence relied upon was, that *Haley* had become bankrupt,

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and that the plaintiff had made his election under the 49 *G. 3 c. 121. ſ. 14.* by proving his debt under the commiſſion. The queſtion turned upon the act of bankruptcy, as to which a witneſs, who was a neighbour of *Haley*, proved that on the 23d of *April Haley* came to his ſhop, and ſaid that he expected every moment to be arreſted, but did not mention any means of avoiding it. When he was about to leave the witneſs's ſhop, a ſheriff's officer having juſt gone down the ſtreet, the witneſs told *Haley* that he was going towards his houſe; on which he became agitated, and deſired the witneſs to watch him; and that he might not be ſeen by the officer, went into the witneſs's back ſhop; and told him that he went thither for that purpoſe, and was afraid that the officer had a writ againſt him. He wiſhed the witneſs to ſee if the officer went to his premiſes. The officer did not go thither, but after going to another houſe, left the ſtreet; and when he was gone the witneſs told *Haley*, who ſtill continued in the back ſhop; upon which he ſaid, "Thank God, I will now go in;" and the witneſs then ſaw him go home. The learned Judge was of opinion that *Haley*, inaſmuch as he was about to leave the witneſs's ſhop when he received the intelligence about the ſheriff's officer, and thereupon retired and concealed himſelf in the back ſhop, and continued there until he knew that the officer had paſſed his houſe, and was gone away in another direction, and this for the expreſs and declared purpoſe of avoiding an arreſt, had abſented himſelf to the intent to delay his creditors within the meaning of 13 *Eliz. c. 7. ſ. 1.* and 1 *Jac. 1. c. 15. ſ. 2.*, although he had not departed from his dwelling-houſe to that intent; which was a diſtinct act of bankruptcy created by a

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different branch of the clauſe. Whereupon a verdict was found for the defendant.

In *Eaſter* term a rule niſi was obtained for a new trial, on the ground that a delay in returning to his houſe, cauſed by the mere apprehenſion of arreſt, had never been decided to amount to an act of bankruptcy; and the caſe was likened to *Garret* v. *Moule* (*a*). And now the rule coming on

Lens Serjt. and *Caſberd* were called upon to ſupport it, who admitted that it had been reſolved that the departure of a trader from his dwelling-houſe, with intent to delay his creditors, was an act of bankruptcy, without proof of any actual delay (*b*); but contended that this caſe did not fall within that rule, becauſe here the caſe ſtood, not only without proof of any actual delay, but there was poſitive evidence excluding the poſſibility of any delay; for it appeared that the officer never went to the houſe of *Haley*, and that *Haley* returned home immediately after the officer had left the ſtreet. There is no caſe where all poſſibility of delay having been poſitively negatived as in this caſe, the party's merely poſtponing his return home for a ſhort time, under the fear that he will be arreſted, without proof that ſuch fear was well founded, or that any writ was out againſt him, has been held to be within the meaning of the ſtatute.

Lord ELLENBOROUGH C. J. The inſtances enumerated in the two acts are the ſeveral criteria of inſol-

(*a*) 5 *T. R.* 575.
(*b*) 9 *Eaſt*, 487., *Robertſon* v. *Liddell.*

vency, by which, when coupled with an intent to hinder his creditors, the party is to be adjudged bankrupt. *Robertſon* v. *Liddell* decided that the intent and not the actual delay was what the ſtatute meant; and the moment the Court have determined that, it becomes immaterial whether there was a poſſibility or not of delay.

LE BLANC J. The difficulty is how to draw any other line than the intent.

BAYLEY J. The act of bankruptcy depends on the intent to delay, and not on the intent being productive of the effect of delay.

Per Curiam, Rule diſcharged.

Pell Serjt. and *Gifford* were to have ſhewn cauſe.

WEEKS *againſt* A. SPARKE, W. SPARKE, and W. SPARKE, Jun.

Thurſday, July 1ſt.

TRESPASS for breaking and entering the plaintiff's cloſe, parcel of a common in the pariſh of *Inward Leigh*, in the county of *Devon*. Plea, the general iſſue; and the defendants alſo juſtified in right of *A. Sparke*, under a preſcriptive right of common throughout the locus in quo at all times, as appurtenant to a meſ-

Treſpaſs quare clauſum fregit. Plea of preſcriptive right of common over the locus in quo at all times for his cattle, levant and couchant; replication preſcribing in right

of his meſſuage to uſe the locus in quo for tillage with corn, and until the taking in of the corn to hold and enjoy the ſame in every year, and traverſed the defendant's preſcription; on which iſſue joined: Held that many perſons beſides defendant having a right of common over the locus in quo, evidence of reputation as to the right claimed by plaintiff was admiſſible, a foundation being firſt laid by evidence of the enjoyment of ſuch right; and that plaintiff's right might legally exiſt as a qualification of defendant's right, and was not repugnant to it.

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ſuage and land belonging to the ſaid *A. Sparke*, for his cattle, levant and couchant; and that the locus in quo was wrongfully incloſed, ſo that they could not enjoy the ſaid right of common, &c. Replication that the plaintiff was ſeiſed in fee of a meſſuage called *Lower Goſhuiſh*, in the pariſh of *North Lew*, and that there was and immemorially hath been another meſſuage alſo called *Lower Goſhuiſh*, and preſcribed in right of his meſſuage to uſe the locus in quo for tillage with corn, and until the taking in of the corn thereby produced, to hold and enjoy the ſame in every year in which the ſame might be tilled according to the rules of good huſbandry, and in which the ſame was not ſo tilled by the occupier of the other meſſuage called *Lower Goſhuiſh*, and traverſed the defendant's preſcription; upon which traverſe iſſue was joined. At the trial before *Chambre* J., at the laſt aſſizes for the county of *Devon*, the plaintiff proved two inſtances of the exerciſe of the right of tillage upon the common, which conſiſted of about 300 acres; one as far back as 60 years ago, by the then occupier of his meſſuage, and another by his father, whom he ſucceeded about 11 years ago, for three ſucceſſive years; and that the common, from the ridges and furrows now to be ſeen, had the appearance of having been at ſome time all tilled. The plaintiff alſo by ſeveral witneſſes gave evidence of reputation as to the exiſtence of ſuch right, viz. that the occupiers of the two meſſuages called *Lower Goſhuiſh* had the right of tillage. This evidence was objected to and the caſe of *Morewood* v. *Wood* (*a*) was cited, but the learned Judge admitted it, being of opinion that as both the plaintiff's

(*a*) 14 *Eaſt*, 327.

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and the defendants' claims were prescriptive, and instances of the actual exercise of the right claimed by the plaintiff had been proved, evidence of reputation to confirm the other evidence was admissible. The same witnesses who proved the plaintiff's case, proved also on cross-examination that the defendants turned on their cattle upon the common at all times. The defendants called no witnesses. The learned Judge stated to the jury that the right of common claimed by the defendants was denied only in respect of its generality; the plaintiff insisting that it was qualified by the right of tillage and inclosure, stated in the inducement to his traverse, and consequently that the defendants could not have such right of common as they alledged in their plea. That the right claimed in respect of the two farms appeared to be inconsistent with the enjoyment of any pasturage by the other commoners. It was not limited to the use of any particular part or proportion of the common, or qualified by any terms or conditions whatever, but might be exercised every year, and to the extent of inclosing, tilling, and taking crops from the whole common. The evidence and the pleadings were equally unqualified. Independently of this objection, either as an objection in law, or to the probability of the fact; the learned Judge thought the evidence of enjoyment very unsatisfactory, particularly from these circumstances, that the two farms were small ones, and the privilege contended for, if it existed in its fullest extent, would have been of much more value than the estates themselves, and yet with such inducements to exercise it, it did not appear that they had done so on more than two occasions, besides that which gave rise to this action, one of them 11 or 12 years ago, and the

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other 60 years ago, or more probably taking three ſucceſſive crops on each occaſion, but exerciſing the ſuppoſed right only upon a ſmall proportion of the common. The jury, however, found a verdict for the plaintiff.

In *Eaſter* term *Lens* Serjt. obtained a rule niſi for a new trial, upon the ground, 1ſt, That this was a verdict againſt evidence; 2d, That the preſcriptive right claimed in the replication was in deſtruction of the defendant's right, and repugnant to it; 3dly, That evidence of reputation was admitted.

Moore, *Buller*, and *Gifford* now ſhewed cauſe, and confined themſelves to the two laſt points, it being admitted on the other ſide that if reputation was held to be admiſſible in this caſe, it would make the balance of evidence preponderate in favour of the plaintiff. Upon the 2d point they contended, that theſe two rights might well ſtand together, that of the plaintiff being a qualification of the general right of the defendant over the whole common; and the plaintiff's right was good in point of law, for it might have had a legal commencement: as ſuppoſe it introduced at the ſame time with the grant of common by the owner of the *Geſbuiſh* tenements, then the owner of the ſoil of the whole common; the grantor might qualify the grant in this way. Upon this point they cited *Bateſon* v. *Green* (*a*), *Clarkſon* v. *Woodhouſe* (*b*), and *Spooner* v. *Day* (*c*); and the Court intimated an opinion that this right was pleaded as a qualification of the defendant's right, which was general and unqualified, and that the caſe was within the ſcope of

(*a*) 5 *T. R.* 411. (*b*) *Ibid.* 412. n. (*c*) *Cro. Car.* 432.

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Bateſon v. *Green*, where the right claimed by the lord, if exerciſed to its full extent, would have made the rights of the commoners of little or no value. Laſtly, they contended that the evidence was properly received. The objection is that this was hearſay evidence in a matter of private right, and that hearſay evidence can only be received where a public right is in queſtion. But authorities are not wanting to ſhew that ſuch evidence was admiſſible in this caſe. In *Bull. N. P.* 295. it is laid down that in queſtions of preſcription it is allowable to give hearſay evidence in order to prove a general reputation; and the caſe of *Skinner* v. Lord *Bellamont* is cited, where the defendants were admitted to give hearſay evidence, upon an iſſue reſpecting a right to a way over the plaintiff's cloſe. So in *Rex* v. *Eriſwell* (*a*) *Groſe* J. conſidered it as an exception to the general rule, that preſcriptive rights may be proved by reputation; and *Buller* J. obſerved, that hearſay evidence had been received to prove whether land were or were not parcel of a certain tenement (*b*). In *Morewood* v. *Wood* (*c*) it was admitted on all hands that reputation was evidence in ſupport of a cuſtom; and Lord Kenyon aſſigns the reaſon, becauſe all mankind being intereſted in the ſubject, it is to be preſumed that they will be converſant with and diſcourſe together upon it; which, he ſays, cannot apply to private preſcriptions: but ſurely it applies, though perhaps not in an equal degree to preſcription as well as cuſtom. The better reaſon ſeems to be, and that will apply equally to both cuſtom and preſcription, that it is evidence of declarations made by perſons who had not any intereſt at the time for making

(*a*) 3 *T. R.* 709. (*b*) *Ibid.* 719. (*c*) 14 *Eaſt*, 327. n.

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them, upon a ſubject which from its nature reſts in tradition. Therefore in *Nicholls* v. *Parker* (*a*) it was received upon a queſtion of boundary between two pariſhes and manors; and it is underſtood to be the uniform practice of the Court of Exchequer, to admit it upon queſtions of modus, without regarding the diſtinction whether the modus pervades a whole pariſh or affects a particular farm only (*b*). It has alſo been the practice of the northern and weſtern circuits to admit it: at the *Bodmin* ſummer aſſizes 1812, cor. *Graham* B., Sir *A. Moleſworth* v. *Brune*, the plaintiff, offered evidence of reputation as to the boundaries of a manor, which was received; and the plaintiff had a verdict, and no application was afterwards made for a new trial. So in *Stanley* v. *White* (*c*), upon an iſſue whether certain trees were the freehold of the plaintiff or the defendant, hearſay evidence was received at the trial at *Cheſter*, and this Court, upon a motion for a new trial, did not diſapprove of it; and yet a right of a more private nature than that can hardly be conceived. Here, it may be obſerved, the queſtion relates to a right which concerns an aggregate body of perſons, and partakes of the nature of a public right; a fortiori, therefore, the evidence was admiſſible in ſuch a caſe.

Lens Serjt. and *Bayly*, contrà, contended, upon the laſt point, that it had been treated as if the admiſſion of hearſay was a general rule of evidence, and not an exception to the general rule; whereas, on the contrary, the general rule is that hearſay evidence is not admiſſible, and its admiſſion in any inſtance is only by

(*a*) 14 *Eaſt*, 331. *n.*
(*b*) *Webb* v. *Petts*, *Noy*, 44.
(*c*) 14 *Eaſt*, 332.

way

way of exception. Now the exception is that on general points and matters which concern the public ſuch evidence is admiſſible; and the principle on which that exception is founded ſeems to be that in ſuch matters all mankind is intereſted in preſerving the evidence. In all the inſtances cited, where the evidence has been received, it will be found that they either involved queſtions of public right, or in ſome degree partaking of a public right. Under this head may be claſſed the boundaries of pariſhes or manors, which are more or leſs of public concern, and are frequently determined by a kind of lex loci pervading thoſe diſtricts. Perambulations are made from time to time, and the remembrance of them is preſerved in a large body of perſons by tradition from one to the other. Manors alſo have public courts in which the rights and cuſtoms of thoſe manors are publicly diſcuſſed and recorded. Perhaps the caſe of a modus is ſui generis; it has been conſidered in all its relations as a matter affecting the eccleſiaſtical eſtabliſhment: but there is no reaſon for departing farther from the general rule upon an authority which, if not doubtful, is at leaſt anomalous. The law in many inſtances diſtinguiſhes between cuſtom and preſcription, it permits one tenant claiming under the ſame preſcription that another tenant claims to be a witneſs in ſupport of that preſcription, but not in ſupport of the ſame cuſtom. The true criterion then as to the admiſſibility of evidence of reputation ſeems to be that which was laid down by Lord *Kenyon* in *Morewood* v. *Wood*, and was afterwards agreed to by him in *Reed* v. *Jackſon* (*a*); and the ſame was adopted at niſi prius in *Clothier*

(*a*) 1 *Eaſt*, 357.

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v. *Chapman* (*a*). The evidence in *Stanley* v. *White* was not admitted as reputation, but as explanatory of an act done by the tenant in poſſeſſion of the premiſes claimed by the defendant in derogation of that claim. In this caſe the claim is confined to a preſcriptive right belonging to the individual owner of the *Goſhuiſh* tenements, which is ſtrictly a matter of private preſcription. It is therefore, in ſuch caſes, better to adhere to the general rule, than by relaxing it to let in a ſpecies of evidence, which is at all times vague and inconcluſive.

Lord ELLENBOROUGH C. J. The admiſſion of hearſay evidence upon all occaſions, whether in matters of public or private right, is ſomewhat of an anomaly, and forms an exception to the general rules of evidence. The queſtion here is whether this is a caſe of a public or merely private right; and ſuppoſing it to be merely a private right, whether according to the habit and practice of the circuit on which it was tried reputation can be received. I confeſs myſelf at a loſs fully to underſtand upon what principle, even in matters of public right, reputation was ever deemed admiſſible evidence. It is ſaid, indeed, that upon queſtions of public right all are intereſted, and muſt be preſumed converſant with them; and that is the diſtinction taken between public and private rights: but I muſt confeſs I have not been able to ſee the force of the principle on which that diſtinction is founded ſo clearly as others have done, though I muſt admit its exiſtence; and it has not been controverted in argument to-day, that in the caſe

(*a*) 14 *East*, 331.

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of public rights reputation is to be received in evidence. As to the nature of the right in queſtion, I think it may be ſaid in ſome ſenſe to partake of the nature of a public right: although one individual only ſtands upon it in this inſtance, yet it is underſtood that there are others ſtanding in pari jure with the defendant; therefore it may be conſidered in this view as a queſtion between the plaintiff and a multitude of perſons; though in other views perhaps it is hardly fair ſo to conſider it, where the record ſhews it to be a queſtion between individuals only, and not between a multitude of litigants. As to thoſe caſes where the evidence of perambulations is admitted, it is certainly in the nature of hearſay evidence not of particular acts done, as that ſuch a turf was dug, or ſuch a poſt put down in a particular ſpot; for that would amount to evidence of ownerſhip; but it is evidence of the ambit of any particular place or pariſh, and of what the perſons accompanying the ſurvey have been heard to ſay and do upon ſuch occaſions. Reputation is in general weak evidence; and when it is admitted, it is the duty of the Judge to impreſs on the minds of the jury how little concluſive it ought to be, leſt it ſhould have more weight with them than it ought to have. It is ſtated to be the habit and practice of different circuits to admit this ſpecies of evidence, upon ſuch a queſtion as the preſent. That certainly cannot make the law, but it ſhews at leaſt from the eſtabliſhed practice of a large branch of the profeſſion, and of the Judges who have preſided at various times on thoſe circuits, what the prevailing opinion has been upon this ſubject, amongſt ſo large a claſs of perſons intereſted in the due adminiſtration of the law. It is ſtated to have been the practice both of

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of the northern and weſtern circuits. My learned predeceſſor, Lord *Kenyon*, certainly held a different opinion; the practice of the *Oxford* circuit, of which he was a member, being different; but he ſeems to have entertained that opinion as to rights purely of a private nature, and not affecting in any way a public intereſt. In the preſent caſe I am not prepared to ſay that the learned Judge did wrong in admitting this evidence; it is probable that I ſhould have admitted it myſelf. Therefore I am not prepared to ſay that there ſhould be a new trial.

LE BLANC J. I rather think that this evidence was properly admitted. The objection taken upon the evidence ariſes principally out of the examination of two witneſſes, the firſt of whom ſpeaks as to having heard his father, who was dead, ſay, that the occupiers of the two meſſuages called *Lower Goſbuiſh* had the right of tillage over the common, and that no one elſe had; and the other witneſs ſpeaks to the ſame effect. There are other parts of the evidence, where the witneſſes depoſe to what deceaſed perſons ſaid at the time when this right of tillage was exerciſed. The queſtion aroſe upon a claim of a preſcriptive right of common; ſuch a right as the party alleged to have exiſted beyond the time of legal memory; and the queſtion is how that right is to be proved. Firſt, it is to be proved by acts of enjoyment within the period of living memory. And when that foundation is laid, then inaſmuch as there cannot be any witneſſes to ſpeak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old perſons, (not any old perſons, but perſons who have been converſant with the neighbourhood where the waſte lies over which the

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particular right of common is claimed,) of what they have heard other perſons, of the ſame neighbourhood, who are deceaſed, ſay reſpecting the right. Thus far it is evidence as applicable to this preſcriptive right, it being a preſcription in which others are concerned as well as the perſon claiming it; becauſe a right of common is to a certain degree a public right. And the only evidence of reputation which was received was that from perſons connected with the diſtrict. In the ſame manner in queſtions of pedigree, although they are not of a public nature, the evidence of what perſons connected with the family have been heard to ſay, is received, as to the ſtate of that family. In like manner alſo upon queſtions of boundary, though the evidence of perambulations may be conſidered to a certain degree as evidence of an exerciſe of the right, yet it has been uſual to go further and admit the evidence of what old perſons who are deceaſed have been heard to ſay on thoſe occaſions. The rule generally adopted upon queſtions either of preſcription or cuſtom is this, that after a foundation is once laid of the right by proving acts of ownerſhip, then the evidence of reputation becomes admiſſible, ſuch evidence being confined to what old perſons who were in a ſituation to know what theſe rights are, have been heard to ſay concerning them. The iſſue here was on the preſcriptive right of common, and the evidence admitted was as to a right derogatory to that preſcriptive right; which muſt be governed by the ſame rules.

BAYLEY J. I think the evidence of reputation was properly admitted. In caſes of preſcription, which muſt have originated beyond the time of legal memory, and of which it is impoſſible to eſtabliſh the claim by evidence of

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of the grant, reputation seems to be admissible, and therefore for that reason when instances have been adduced to shew the exercise of the right claimed, it is usual to admit it. But it is not necessary to go that length to-day; because this evidence falls within the instances put and agreed to by my brother *Lens*; viz. that it is evidence which refers to the lex loci, or to the mode in which a particular district is to be used, and to what is the general right as it concerns a multitude of persons within that district. Here is a common of considerable extent, on which it is admitted that a number of persons have a right to turn on. The question is, how that number of persons is entitled to use it. If the plaintiffs could establish their right to till the common in the way pleaded, those persons would have only a qualified right subject to an opposing right, which in many instances would deprive them of the enjoyment of their right; and therefore it seems to fall within the distinction laid down by my brother *Lens*. I take it that where the term public right is used, it does not mean public in the literal sense, but is synonimous with general; that is, what concerns a multitude of persons. Now this is a general right exercised by a variety of persons, though not a public right of common.

DAMPIER J. In all cases where reputation is admitted in evidence, it is necessary to lay a foundation for its admission by first proving an exercise of the right; for that lets in reputation. In public rights it is not disputed that reputation is admissible; and that it has been extended to other rights which cannot be strictly called public, such as manors, parishes, and a modus, which comes the nearest to this case. That, strictly speaking,

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is a private right, but has been conſidered as public, as it regards the admiſſibility of this ſpecies of evidence, becauſe it affects a large number of occupiers within a diſtrict. Here a private right is claimed by an individual, that is, a right of common over an extenſive waſte, over which many others have the ſame right, every year and at all times of the year; and this is oppoſed by ſhewing a right of tillage, and incloſure for that purpoſe; which is ſo far an abridgment of the general right of the whole body. We know it is frequent in the Weſt of *England* for almoſt every perſon to have a right of common in reſpect of his tenement: if then any individual has a right which tends to abridge the right of the whole neighbourhood, the evidence of reputation is admiſſible. This is analogous to the caſes of a modus, and of the boundaries of pariſhes and manors; and I know the evidence has been generally received on the Weſtern Circuit. There may be particular caſes where it would be difficult to preſs it; as in the inſtance of a mere private right of way claimed over a particular field; perhaps this diſtinction might not apply. But here the right claimed goes to abridge the rights of all the perſons concerned over a large diſtrict of common, and therefore I think this evidence is admiſſible.

Rule diſcharged.

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Friday, July 2d.

GOODRIGHT, on the ſeveral Demiſes of J. REVELL, S. REVELL, R. COCK, and of J. STEELE, *againſt* MARY PARKER and Others.

Deviſe of teſtator's leaſehold houſes, held for a term renewable, to *J. T. S.* to his own uſe and benefit on his attaining 21, upon truſt that his (the teſtator's) truſtees ſhould pay and perform rents, and covenants, and renew the ſame from time to time, and for that purpoſe to make ſurrender, &c., and alſo to permit the truſtees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to *M. P.* to keep the houſes during the minority paying rent to the truſtees, &c.: Held that this was in effect a deviſe to the truſtees during the minority, with a veſted remainder to *J. T. S.* the infant; and that the intereſt of *M. P.* ceaſed on the death of *J. T. S.* before 21.

EJECTMENT, tried at the laſt ſummer aſſizes for the county of *Devon*, before *Chambre* J. Verdict for the plaintiff upon the demiſe of *J. Steele*, ſubject to the opinion of the Court upon the following caſe:

William Rowe, being poſſeſſed of five houſes and tenements in *Eaſt Stonehouſe*, held by him for the reſidue of certain terms for 99 years determinable on three lives reſpectively, with a covenant from the leſſor to renew on their deaths at a fine certain, by his will dated the 5th of *September* 1810, deviſed, "Item, I give and bequeath to *John Thomas Steele*, ſon of *John Steele* (the leſſor of plaintiff) all thoſe five meſſuages or dwelling-houſes, &c. to and for his own uſe and benefit on his attaining his age of 21 years, upon truſt that they my truſtees hereinafter named ſhall pay and perform the rents and covenants on the leſſees part and behalf to be performed, and to renew the ſame from time to time as occaſion ſhall require, and for that purpoſe to make ſuch ſurrender of the leaſe ſo to be renewed as ſhall be requiſite and neceſſary in that behalf, and out of the rents, iſſues, and profits of the ſaid premiſes to raiſe ſuch money as ſhall be ſufficient for paying the ſeveral fines and other neceſſary charges of renewing the ſaid leaſe from time to time, and ſubject thereunto, and alſo to permit and ſuffer my truſtees to receive the rents and profits of the ſaid ſeveral

houſes during the minority of the ſaid *J. T. Steele*, and the maintenance and ſupport of the ſaid *J. T. Steele* during his minority to be taken and paid out of the rents and profits of the ſaid houſes." And after making ſeveral bequeſts to *Mary Parker* (the defendant) he directed, "And if the ſaid *M. Parker* ſhould wiſh to keep the five meſſuages or dwelling-houſes and premiſes, with the appurtenants, as lodging-houſes, at the rate of 80*l.* per annum, and pay and diſcharge all rates, taxes, and impoſitions, and alſo to keep the premiſes in good repair during the minority of the ſaid *J. T. Steele*, ſhe may be at liberty ſo to do by paying the ſaid rent to the ſaid truſtees hereinafter named, and alſo by paying the ſaid taxes, or otherwiſe ſhe is to deliver up the ſeveral premiſes to my ſaid truſtees within three months after my deceaſe." The teſtator then gave to his truſtees ſeveral other houſes, with the appurtenants, to be ſold for the payment of all his juſt debts, &c. and appointed *J. Revell*, and *S. Revell*, (two of the leſſors of the plaintiff) truſtees of his will, and *M. Parker*, his ſole executrix. The teſtator died ſo poſſeſſed as aforeſaid, without having altered or revoked his will, and the defendant *M. Parker*, proved the ſame, and took poſſeſſion of the premiſes in queſtion, and ſtill holds part thereof, the other defendants being in the poſſeſſion of the remainder, and claiming under her. *M. Parker* aſſented to the bequeſts in the will, and in *January* 1811 *J. T. Steele* died an infant, and would not have attained the age of 21 if he had been ſtill living, and in the *April* following his father *J. Steele* (one of the leſſors of the plaintiff) obtained letters of adminiſtration of his perſonal eſtate and effects, and is at preſent his perſonal repreſentative.

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The queſtions for the opinion of the Court are, whether in the events that have happened the ſaid *J. Steele*, or the ſaid *J. Revell* and *S. Revell*, in truſt for his uſe and benefit, is or are entitled to the premiſes in queſtion; if the opinion of the Court ſhall be in the affirmative, the judgment is to ſtand, if otherwiſe, a nonſuit is to be entered.

Bayly, for the plaintiff, contended that under this deviſe the whole of the teſtator's intereſt paſſed to the infant, and nothing but a bare power was given to the truſtees; and he cited ſeveral authorities (*a*) to ſhew that a man may give a power to a ſtranger, which is naked and collateral, and not annexed to any eſtate. But if it ſhould be deemed neceſſary, for effectuating theſe truſts, that the truſtees ſhould take the legal eſtate, in that caſe he ſaid it was a deviſe to them till the infant attained 21, remainder to the infant; which remainder veſted in him immediately, without waiting for his attaining that age; and in ſupport of this he cited *Boraſton's* caſe (*b*), *Goodtitle* v. *Whitby* (*c*), *Doe* v. *Lea* (*d*). And this was a ſtronger caſe for holding that the party took a veſted remainder than the caſes cited, becauſe in thoſe caſes there was an expreſs deviſe to the truſtees before the deviſe to the infant, whereas here the whole is given in the firſt inſtance to the infant, and the eſtate of the truſtees is by implication only. As to the intereſt of *M. Parker*, (the defendant) he contended that it determined on the deceaſe of the infant. This was not a

(*a*) *Bro. Abr. Teſtament, pl.* 22. *Com. Dig.* tit. *Poiar* A. 1. 2 *Vent.* 350. *Sayle* v. *Freeland.*

(*b*) 3 *Rep.* 19. a. (*c*) 1 *Burr.* 228. (*d*) 3 *T. R.* 41.

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deviſe to the truſtees of ſuch a nature as muſt be intended to give them an eſtate for ſo long a time as the infant, if he had lived, would have attained the age of 21; and *M. Parker* was to pay rent to the truſtees during the time ſhe was to be permitted to keep the houſes; conſequently her intereſt was not to continue longer than that of the truſtees. Upon this point he cited *Lomax* v. *Holmeden*. (*a*)

Gaſelee contrà, admitted that the remainder veſted in the infant upon the teſtator's death, but took this diſtinction, that in the caſes cited there were words of inheritance, whereas here the deviſe is to the infant, without any words of inheritance; and therefore, though it might veſt in him immediately, it would not take effect on his death, until the time when he would have attained 21. At all events the title of *M. Parker* was not to be defeated until that period.

Lord ELLENBOROUGH C. J. ſaid that here the truſtees were not only to pay rents and perform covenants, but to renew from time to time and for that purpoſe to ſurrender, which did not well accord with the argument of their having a mere power only. But on the other points his Lordſhip, after referring to *Hanſon* v. *Graham* (*b*) in which moſt of the caſes were conſidered, ſaid that the preſent deviſe was in effect a deviſe to the truſtees till *J. T. Steele* attained the age of 21, remainder to *J. T. Steele*, in which caſe the remainder veſts preſently; and if it veſts for one purpoſe, it does ſo for all. As to

(*a*) 3 *P. Wms.* 175. (*b*) 6 *Veſ.* 239.

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the title of *M. Parker*, ſhe was to pay rent to the truſtees, and of courſe her intereſt could not be intended to laſt beyond the time ſhe was to pay rent.

Per Curiam, Judgment for the plaintiff.

Saturday, July 3d.

The defendant was allowed to enter ſatisfaction on the roll upon a judgment obtained againſt him in this court on his acknowledging ſatisfaction for the amount upon a judgment obtained by him in *C. P.* againſt the plaintiff for a larger amount, although he had the plaintiff in cuſtody in execution of that judgment.

SIMPSON *againſt* HANLEY and Another.

THE defendant *Hanley* had obtained judgment againſt the plaintiff in the Common Pleas for 60*l.* debt, and 26*l.* 6*s.* coſts, and had taken him in execution under a writ wrongly iſſued out of this court, upon which the plaintiff brought an action in this court for falſe impriſonment, and recovered againſt the defendant 50*l.* damages, and 19*l.* 10*s.* coſts. Afterwards the defendant took the plaintiff in execution by a proper writ iſſued out of the common pleas, and the plaintiff being ſtill in cuſtody under that writ, a rule niſi was obtained for the defendant, why upon his (the defendant's) acknowledging ſatisfaction for 69*l.* 10*s.*, in the cauſe in the Common Pleas he ſhould not be at liberty to enter ſatisfaction upon the judgment roll in this court.

Marryat ſhewed cauſe, and contended that the plaintiff by remaining in execution upon the judgment againſt him in *C. P.* was diſcharged by law from that judgment, having made ſatisfaction.

HEATH, in ſupport of the rule, relied on *Peacock* v. *Jeffery*. (*a*)

(*a*) 1 *Taun.* 426.

DAMPIER

DAMPIER J. (the only Judge in court) said that the case cited was precisely in point, and therefore he considered himself bound by it, and made the

Rule absolute.

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The KING *against* The Mayor, Burgesses, and Commonalty of CARMARTHEN.

Saturday, July 3d.

MANDAMUS. The writ recited that by letters patent (27 *July*, 1764,) the borough of *Carmarthen* was incorporated, and that it was ordained that no person should be a burgess except such person as for three years previously to his application to become a burgess, had been seised of a freehold for life, or some greater estate, of the yearly value of 4*l.*, or seised of land which had come to him by descent, or marriage, or who had been an apprentice for seven years with a burgess, so as such person did make application for that purpose to the mayor and commonalty of the borough on *Monday* next after *Michaelmas* in each year, *and at no other time*, and so as such person did *then* before the said mayor and commonalty make due and legal proof of his qualification, and that upon such proof such person should be admitted a burgess at the next, or any subsequent fortnight court, to be holden in and for the

Where a charter of incorporation after ordaining who should be entitled to be burgesses, directed that they should make application for that purpose to the mayor and commonalty *on a day certain* in each year, and *at no other time*, and *then* make due and legal proof of their qualifications, and *A.* and *B.* claiming to be admitted burgesses, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received, on account of the time having been spent in other business; the Court granted a mandamus to the mayor and commonalty to enter an adjournment to a subsequent day, and then to hold a meeting, and receive and examine such proofs, &c.: and a return to such mandamus that it was impossible for *A.* and *B.*, before the expiration of the charter day, to make due and legal proof, &c., according to the intent of the charter, by reason of the day being consumed in the necessary business of the borough, and that the mayor and commonalty were not authorized to hear such proof on any other than the charter day, &c., was held ill and quashed.

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ſaid borough, after ſuch day on which he ſhould make his claim: and alſo recited that on *Monday* next after *Michaelmas* then laſt paſt, the mayor and commonalty had aſſembled, in order to tranſact the buſineſs of the borough, and (inter alia) to receive the applications of perſons claiming to be entitled to their admiſſions as burgeſſes, and to hear and examine the proofs made by ſuch perſons, and that *Thomas Davies* and others, claiming to be admitted as burgeſſes, made application for that purpoſe, and offered to make due and legal proof of their qualifications, but by reaſon of the time ſpent by the mayor and commonalty in other buſineſs, their applications were not then heard, nor was their proof received, whereupon it became the duty of the mayor and commonalty to adjourn the meeting to ſome other convenient day, for the purpoſe of receiving ſuch proof, and hearing and determining ſuch applications, and to cauſe ſuch adjournment to be duly entered on the records of the borough; yet that the mayor and commonalty not regarding their duty, omitted ſo to do. The writ then commanded the mayor and commonalty to enter an adjournment to ſome ſubſequent convenient day, and on that day to hold a meeting and receive and examine the proof offered by *Davies* and the other applicants; and to hear and determine the matter of ſuch applications.

The corporation returned, that by reaſon of the whole of the day being conſumed in the neceſſary buſineſs of the borough, and in hearing and inveſtigating the proofs of the perſons claiming their admiſſions as burgeſſes, it became and was impoſſible for *Davies* and the other perſons, before the expiration of that day, to make due and legal proof of their qualifications, according to the true intent and meaning of the letters patent:

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and they farther returned, that by the letters patent no perſon can be lawfully admitted and ſworn a burgeſs of the borough, unleſs ſuch perſon ſhall make application on *Monday* next after *Michaelmas*, *and at no other time*, and *then and there* make due and legal proof of his qualification: and that the mayor and commonalty are not by the letters patent authorized to hear ſuch proof on any other day than the day laſt aforeſaid, nor to make any adjournment from that day to any other day, for that purpoſe; nor is any perſon entitled to be admitted a burgeſs, whoſe qualification ſhall be proved at any other time ſave and except the *Monday* after *Michaelmas*, which day is the day excluſively appointed for that purpoſe by the ſaid letters patent; and for theſe reaſons they ſubmitted that the mayor and commonalty cannot enter, or cauſe to be entered, on the records of the ſaid borough, an adjournment of the ſaid meeting or aſſembly ſo holden on the *Monday* next after *Michaelmas* laſt paſt, to any ſubſequent day, nor at any ſubſequent day hear and examine the proofs which may be offered by the ſaid *T. Davies*, and the ſaid other perſons whoſe applications to be admitted as aforeſaid, were made upon the ſaid *Monday* laſt mentioned, and not then heard.

Abbott, for the proſecutors, ſubmitted that as the return did not deny the qualifications of the proſecutors, the only queſtion was whether upon the conſtruction of this charter, if the whole of the charter-day be occupied in the buſineſs of the charter, without the means of bringing it to a concluſion, the corporation has power to adjourn to another day, or whether the parties making their claims muſt wait until another year. He inſiſted

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LE BLANC J. (*a*) There is no doubt that a peremptory mandamus ought to go. The proviſions of the charter are to enable perſons having a previous inchoate right to perfect that right by being admitted. Therefore the charter preſcribes a particular day for making the application; it directs that ſuch perſons as are entitled under the charter ſhall be admitted to their freedom, ſo as they make application for that purpoſe to the mayor and commonalty on *Monday* next after *Michaelmas* in each year. So far the charter limits the time for making application to a particular day, and it adds at no other time. Then it goes on, "and ſo as ſuch perſon do then before the ſaid mayor and commonalty make legal proof of his qualification," and it proceeds, "and that on ſuch proof ſuch perſon ſhall be admitted a burgeſs at the next or any ſubſequent fortnight court." The making the claim cannot occupy much time, but the examination of the evidence in order to ſubſtantiate the claim either of a perſon claiming in reſpect of his property, or as an apprentice, may poſſibly run to a conſiderable length. The claim is reſtricted to a particular day; but the words of the charter do not confine the ſubſtantiating ſuch claim to the particular day; "then and there make legal proof" does not in its grammatical ſenſe or by any rule of conſtruction, and certainly there is no reaſon why we ſhould ſo conſtrue it, import that if the length of day be not ſufficient to enable them to make good their titles, that they ſhould be precluded altogether, and ſo be delayed till the next year, or to an indefinite period. As to the inconvenience ariſing from the other conſtruction, I am not aware that it is likely to be great. It is ſug-

(*a*) Lord *Ellenborough* C. J. was abſent.

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geſted that it might enable the corporate body to adjourn too ſoon; but if the Court ſaw that any improper uſe was made of their power of adjournment, we might correct it. On the other hand, if we deny the power of adjournment, the probable inconvenience would be greater, for ſome one buſineſs might eaſily be protracted till 12 at night, to the excluſion of all the other buſineſs, which muſt in that caſe neceſſarily go over to the next year. The caſe of an election of a mayor before the ſtatute where the charter-day was ſuffered to elapſe, does not apply; and not any caſe has been cited where an election was commenced on the charter-day, but not concluded. The caſes are, either where an aſſembly for the election of a mayor was not holden at all, or where having been holden, the election was colorable. In both thoſe caſes the aſſembly could not be holden after the day, becauſe there had not been any commencement of a due election on the day. In this caſe it appears that from unavoidable neceſſity the whole day had been exhauſted, not before the claims were made, but before the evidence in ſupport of them could be heard. Common ſenſe ſhews that the charter muſt have meant that the corporate body ſhould have power to adjourn in order to conclude ſuch buſineſs as they had regularly begun, otherwiſe it would be in the power of any perſon by contrivance to protract the buſineſs and prevent the claims being effectual. Upon theſe grounds it ſtrikes me that a peremptory mandamus ought to go.

BAYLEY J. I am of the ſame opinion. If the aſſembly had no power to adjourn and proceed at another time, ſtill I ſhould think this return would be bad; becauſe in that caſe it ought to have ſtated that the corporate body

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met at the earlieſt period of the day, and to have accounted for every moment of the day, and that they did no other than neceſſary buſineſs, ſuch as was required to be done on that day; and therefore on that ground alone it would be bad: but I have no difficulty in ſaying that the corporation muſt of neceſſity have the power of adjournment, in order to conclude ſuch buſineſs as they began, and had not time to finiſh on the charter-day. The buſineſs to be done is to fill up vacancies in the corporation, and to receive the claims and hear the proofs of ſuch perſons as claim. That is the general buſineſs of the day; which, I take it, conſtitutes one entire buſineſs, as much as the election of a mayor. There is much fallacy in the argument which attempts to diſtinguiſh this from the election of a mayor, as if each man's claim was an individual act and diſtinct, whereas the general buſineſs of the day is all ſuch claims as may be made. Great injuſtice might follow from conſidering them as diſtinct and giving priority to any. If there was any improper bias in the perſons preſent, it might be contrived ſo as not to be able to get through a ſingle claim during the day; thoſe might be put forward whoſe claims were moſt likely to run to the greateſt length of time. Even without any improper bias in any one, queſtions might ariſe in the fair exerciſe of this franchiſe which would naturally occupy much time, ſuch for inſtance, as whether the claimant was ſeiſed of his freehold, or whether he was in by deſcent, and other queſtions of the like nature which might thus occupy the whole day. It ſeems to me therefore that the true conſtruction of the charter is, that the claim muſt be entered on the charter-day, and that the claimant muſt be then prepared with his proofs, and that the aſſembly muſt hear them through, provided there be time

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time on the charter-day; but if not, by adjournment de die in diem until all the claims are disposed of. That will produce no injustice, afford no opportunity of giving preference to one over another, and raise no bias in persons in different interests, to waste the time by protracting the claims of any. It seems to me therefore that this right of adjournment is necessary, and consequently incident.

DAMPIER J. Supposing the construction of the charter to be such as contended for in support of this return, still the return would be bad; because it ought to have shewn to the Court what other necessary business occupied the whole of the day, instead of being stated generally that the whole day was consumed in necessary business: what they call necessary might not, if strictly examined, turn out to be necessary on that day; and if so, it ought to have been adjourned in favour of that business which was necessary. They have returned, that by reason of the whole of the day being consumed in the necessary business of the borough, and hearing proofs of some of the claims, they were unable to proceed in the rest. Non constat but that they may have taken any business of the corporation necessary to be done on some day or other, but not on that day, and have returned that it was necessary; but the Court ought to see that it was necessary, and such as could only be performed on that day. But upon the construction of this charter, I cannot bring myself to think that the construction which has been contended for in support of the return is the correct one. I think that the charter requires that the claims should be entered on the charter-day; but that it is not necessary that they should be investigated, or even begun

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begun to be inveſtigated on that day, if the time will not allow it. The meaning of the thing required is, that the corporation ſhould have notice of the claims, and that the parties making them ſhould be prepared with their proofs in ſupport of them. The argument on the other ſide would go to ſhew, that if the corporation wrongfully refuſed the claims, thoſe claims muſt be ſuſpended until another year: that this caſe is like the caſe of no election, or of a colourable election prior to the ſtatute. But that is puſhing the argument much too far. It ſeems to me, from the very nature of this caſe, to be abſolutely neceſſary that the corporate body ſhould have the power of adjournment, in order to give effect to the inchoate rights of the claimants, and to guard againſt the poſſibility of their claims being fruſtrated by any contrivance. Therefore I am of opinion a peremptory mandamus ought to go.

Return quaſhed.

Saturday, July 3d.

LEVERIDGE *againſt* FORTY and Another.

Where defendants gave a warrant of attorney to ſecure a ſum certain, to be paid half-yearly by inſtalments, with intereſt, on ſpecified days, and that the plaintiff ſhould be at liberty to enter up judgment thereon immediately, but no execution to be iſſued till default made in payment of the ſaid ſum, with intereſt as aforeſaid, by the inſtalments, and in the manner hereinbefore mentioned: Held that the plaintiff might take out execution for the whole on default in payment of the *firſt* inſtalment.

THE defendants had purchaſed the buſineſs and ſtock in trade of the plaintiff, for which they had given him a warrant of attorney in the ſum of 2805*l.* for ſecuring the payment of 1402*l.* 18*s.* 8*d.*, with intereſt, to be paid half-yearly, by inſtalments of 150*l.*, with intereſt from the date of the warrant of attorney; the firſt inſtalment to be paid on the 24th of *June* 1813, and the reſt on the 25th of *December* and 24th of *June* ſucceſſively

till the whole sum of 1402*l.* 18*s.* 8*d*, with interest, should be satisfied; and that the plaintiff should be at liberty to enter up judgment thereon immediately, with this defeasance, "but no execution to be issued until default made in payment of the said sum of 1402*l.* 18*s.* 8*d.* with interest as aforesaid by the instalments and in the manner hereinbefore mentioned."

Upon the first instalment becoming due payment of it was demanded and refused, whereupon the plaintiff entered up judgment, and took out execution for the whole. A rule having been obtained for setting aside that execution, *Andrews* shewed cause, and contended that on the first default the plaintiff was at liberty to take out execution for the whole; and *Topping* and *Curwood*, contrà, observed on the form of this defeasance, which they said would have been in the usual form, not to take out execution until default in payment of the first instalment, if it had been intended only to restrain the execution until that time; and they insisted that at all events the plaintiff was only entitled to execution to the amount of the first instalment.

LE BLANC J. (*a*) said this was a question of construction on the terms of the defeasance. This was a security given by a warrant of attorney. If the warrant of attorney had been without any defeasance, of course the party would be entitled, on the first default, to his execution immediately; but the defeasance is that "no execution is to be issued until default in payment of the said sum by the instalments and in the manner before mentioned;" that is, in the manner prescribed by

(*a*) Lord *Ellenborough* was absent.

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the warrant of attorney. Then by default in payment of the firſt inſtalment on the 24th of *June*, the party had failed in payment in the manner preſcribed by the warrant of attorney, and ſo, according to the words of the defeaſance, "in the manner before mentioned." If the party had meant to provide againſt execution being taken out for the whole before the whole was due, he ſhould have done ſo in expreſs terms; but the only reſtraint on the plaintiff from taking out execution is "until default made in payment of the ſaid ſum by the inſtalments," and default is made by non-payment of the firſt inſtalment. I doubt whether the party would be at liberty to take out another execution, though I do not proceed on that ground.

BAYLEY J. I am of the ſame opinion. The probable intention of the parties was that if any default was made, the plaintiff ſhould be at liberty to levy the whole. There is not any proviſion for levying from time to time as default ſhould be made.

DAMPIER J. The defeaſance is "that the plaintiff ſhall not be at liberty to iſſue execution until default made in payment of the ſaid ſum by the inſtalments, and in the manner before mentioned;" and this caſe falls within the literal conſtruction of theſe words; for default has been made in payment by the inſtalments, by non-payment of one inſtalment. It ſeems to me that this is a caſe where the intention of the parties, as it is to be collected from the inſtrument, was probably their real intention; for the warrant of attorney was given for the good-will of the plaintiff's trade; and therefore the plaintiff might be well content as long as the trade was thriving, and the inſtalments

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were regularly paid, to take payment in that mode; but if there was any fear of insolvency, he would come for the whole at once. I doubt much if in point of law the party could take out a second execution.

Rule discharged.

HARTOP *against* JUCKES, Gent. one, &c.

Saturday, July 3d.

MARRYAT obtained a rule nisi on behalf of the defendant for setting aside the proceedings in this cause for irregularity. The affidavit of the defendant stated that on the 10th of *June* instant he was served with a copy of a bill filed against him at the suit of the plaintiff, partly printed and partly written, on one large sheet of paper, with one duty of 4*d.* stamped thereon, which, upon comparing with the original bill, was found to correspond with it both in printing and writing. The beginning and prayer of the bill and copy were in writing and figures; two of the printed counts were struck out with a pen; the blanks originally left in the six remaining printed counts and the breach were filled up with writing, and many parts were also struck out with a pen. The affidavit went on to negative its being the practice to make such original or copy of a bill, or to insert so many folios in any copy of a bill or declaration delivered in any cause on one duty only; that the number of words and figures in this copy exceeded 17 common law folios.

The rule was opposed on an affidavit of the plaintiff's attorney, which stated that the bill filed contained the usual and accustomed duty, and that the practice was

A copy of a bill filed against an attorney, partly printed and partly written, on one sheet of paper, stamped with a 4*d.* stamp, which contained several printed counts, with two of them struck out, and was otherwise obliterated, and exceeded 17 common law folios, was held to be irregular, as not being a copy written in the usual and accustomed manner, on which the duty of 4*d.* per sheet is imposed by stat. 48 *G.* 3. *c.* 149. sched. a. And it appearing that the bill was framed in the same manner, with the same obliterations, the Court also set that aside as being contrary to the practice of the court.

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not to ingroſs a bill of this or greater length on more than one duty, and that there was no inſtance of uſing two ſkins or duties for ingroſſing a bill under 30 folios; that the moſt common length of declarations in debt was 18 folios, or thereabouts, which the deponent had uſually ingroſſed in one ſheet, and on one duty, before the paſſing the laſt ſtamp act and ſince.

Campbell, who ſhewed cauſe on a former day, firſt took an objection to this application as coming too late, being made after judgment had been ſigned as for want of a plea, and writ of inquiry iſſued, and notice thereof given for this day, and the witneſſes ſubpœnaed. He then referred to 48 *G.* 3. *c.* 149. ſched. 2. which impoſes a duty of *4d.* upon a copy of any declaration, &c. in any court of law, and relied upon the affidavit of the plaintiff's attorney, that one duty was the uſual duty for a bill of that or of greater length.

The Attorney-General, on the part of the ſtamp-office, inſiſted that however the objection of lateneſs might apply to the defendant, it did not affect the ſtamp-office, who could not have any notice of the proceedings until communicated to them by the parties: and he further inſiſted that the ſtamp was irregular, becauſe the paper in reſpect of which it was paid was not written or printed as the act requires, "in ſuch and in the ſame manner and form as the like matters or things have been heretofore accuſtomed to be or are now uſually written or printed."

Lord ELLENBOROUGH C. J. obſerved that it was to be lamented as a conſequence of the ſtatute for render-

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ing the proceedings at law into *Engliſh* (*a*), that the literature of the inferior part of the profeſſion had receded ſince that time; and he added, that the introduction of printed forms was, he believed, of but modern practice.

The Court adjourned the caſe in order to have an opportunity of inſpecting the bill and copy. And now having inſpected them, the Court animadverted on the manner in which they were framed, the greater part of the counts being printed, ſome of the common counts ſtruck out, and otherwiſe obliterated, and ſaid that they would not permit their records to be ſo defaced; and that the juſtice of the caſe would be attained by making the

Rule abſolute (*b*).

(*a*) 4 *G.* 2. *c.* 26. (*b*) See *Champneys* v. *Hamlin*, 12 *Eaſt*, 294.

BLADES and Another *againſt* ARUNDALE.

Monday, July 5th.

TRESPASS for taking goods on 1ſt *January* 1813. Plea not guilty. At the trial before Lord *Ellenborough* C. J., at the *Middleſex* ſittings after *Eaſter* term, it appeared that on the 24th of *October* laſt a writ of fi. fa., at the ſuit of one *Leach*, returnable on the morrow of *All Souls*, was delivered to the plaintiffs, (ſheriff of *Middleſex*,) againſt the goods of one *Wood*, indorſed to levy 87*l.* 1*s.*, beſides poundage, &c., on which day the plain-

Where a ſheriff's officer executed a writ of fi. fa. by going to the houſe and informing the debtor he came to levy on his goods, and laying his hand on a table and ſaying, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away, without leaving any perſon in poſſeſſion, and after the fi. fa. was returnable, but not continued, the landlord diſtrained the goods for rent: Held that the ſheriff could not maintain treſpaſs againſt him.

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tiffs made their warrant to an officer, who went to *Wood*'s lodgings, and informed him that he came to levy on his goods, but made no manual or actual seizure except laying his hand on a table and saying "I take this table," and then locked up the warrant in the table-drawer, took the key, and went away, without leaving any person in possession. The house belonged to one *Lipscombe*, who resided in it, and had let part to *Wood*, and *Lipscombe* was tenant of the whole house to the defendant; and had paid him at *Christmas* all the rent up to that time, except 8*l.*, for which sum the defendant, on the 4th of *January* 1813, distrained and sold the goods in question, which were part of the goods so permitted by the sheriff's officer to remain in *Wood*'s apartment. It did not appear, that the writ of execution had been continued. It was objected, for the defendant, that the plaintiffs had no right to take the goods in execution without having first satisfied the defendant for the arrears of rent under the 8 *Ann. c.* 14., and therefore they could not maintain this action; to which it was answered, that the defendant was not within the description of landlord intended by the statute, not being the immediate landlord; and supposing he was, that he had given no notice to the sheriff. His Lordship directed a nonsuit. Whereupon, on a former day in this term,

Holt obtained a rule nisi for setting it aside, and he cited *Bennet*'s case (*a*), and *Waring* v. *Dewberry* (*b*).

Park and *E. Lawes* now shewed cause, and did not insist on the objection made at the trial; because, admitting the seizure made by the sheriff to have been

(*a*) 2 *Stra.* 787. (*b*) 1 *Stra.* 97.

good,

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good, at the time, ſtill, after the writ had been ſuffered to expire, and no perſon was left in poſſeſſion, the ſheriff muſt be taken to have abandoned the execution, and the goods could no longer be conſidered as remaining in the cuſtody of the law. Conſequently, at the time when the defendant diſtrained, the execution could not operate to make the diſtreſs invalid: and they cited *Parſlow* v. *Cripps* (*a*).

The Attorney-General and *Holt*, contrà, contended that as it was admitted that the ſheriff had once made a good ſeizure, he muſt be conſidered as conſtructively in poſſeſſion at the time of the diſtreſs. Although the ſheriff, if he continued in poſſeſſion after the return of the writ againſt the conſent of *Wood*, might be liable to an action at the ſuit of *Wood*, yet *Wood*'s conſent to his continuing will make his poſſeſſion lawful; and it is a frequent practice, inſtead of renewing the writ, to allow the ſheriff to continue; and he may ſell after the return of the writ (*b*).

Lord ELLENBOROUGH C. J. Admitting that the ſheriff might have continued in poſſeſſion after the return of the writ, the queſtion here is whether by quitting the premiſes after the ſeizure, and leaving no one in charge of the goods, he did not relinquiſh the poſſeſſion. If he did, I am not aware of any caſe, where, upon an abandonment of the poſſeſſion by the ſheriff, the goods have ſtill been holden to remain in the cuſtody of the law, ſo as to make the party diſtraining them a treſpaſſer. In this caſe, what is there to ſhew a continuance of the poſſeſſion after the officer who

(*a*) *Com. Rep.* 204. (*b*) *Jeanes* v. *Wilkins*, 1 *Veſ.* 195.

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made the ſeizure withdrew? The locking up the writ in the drawer certainly cannot amount to it: therefore the poſſeſſion, as ſoon as the ſheriff abandoned it, reverted back to the original owner.

LE BLANC J. I think this caſe may be determined on the ſingle point, that the ſheriff was not in poſſeſſion at the time of the diſtreſs.

BAYLEY J. It is not poſſible to convert the landlord into a treſpaſſer through the medium of a writ locked up in a drawer.

Per Curiam (*a*), Rule diſcharged.

(*a*) *Dampier* J. was abſent.

Monday, July 5th.

RANDOLL *againſt* BELL and Another.

Where the holder of a bill of exchange, who held it in truſt for plaintiff, ſued the drawer, and, pending that ſuit, became bankrupt, and his aſſignees afterwards brought an action againſt the drawer in the bankrupt's name, in which action, the ſheriff having been guilty of an eſcape on meſne proceſs, the aſſignees recovered againſt the ſheriff in an action for the eſcape, damages to the amount of the bill: Held that the plaintiff might maintain money had and received againſt the aſſignees for the damages ſo recovered, allowing to them the coſts and expences. Diſſentient Lord *Ellenborough* C. J.

ACTION for money had and received, to which the defendants pleaded the general iſſue. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after laſt term it appeared, that the plaintiff, who was indebted to one *Allder* in the courſe of trade, gave him a bill of exchange in payment, which exceeded the amount of his debt by about 140*l.*, but was payable at a diſtant day, and ſoon afterwards put into his hands another bill, drawn by *Dufreſne*, and accepted by *Murray*, for 384*l.* 9*s.*, without indorſing it, and requeſted

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queſted him to give him his acceptance for the amount of that, and of the balance due on the firſt bill. *Allder* refuſed to give his acceptance for the whole, but accepted for 315*l.* 10*s.* 6*d.* When the bill upon *Murray* became due it was diſhonored, and *Allder* commenced actions againſt both *Dufreſne* and *Murray*, and afterwards became bankrupt, and a commiſſion iſſued againſt him, under which the defendants were choſen aſſignees. The defendants afterwards brought an action in his name againſt *Dufreſne*; in which action bail having been put in in a wrong county, the defendants thereupon ſued the ſheriff for an eſcape; the ſheriff ſuffered judgment by default, and upon a writ of enquiry the jury gave a verdict for the amount of the bill of exchange on which *Dufreſne* had been arreſted. There was ſome evidence given to ſhew that the attorney for the defendants, whilſt their action was going on againſt the ſheriff, had in a converſation with the plaintiff agreed that they ſhould be accountable to him for the amount of the bill, if they recovered in the action. It was not diſputed that if the money recovered againſt the ſheriff could be conſidered as the produce of the bill, the plaintiff would be entitled to recover; but the queſtion under theſe circumſtances was, whether it could be ſo conſidered. His Lordſhip ruled, that the action againſt the ſheriff being for a tort, the money recovered in it by the defendants could not be conſidered as money recovered on the bill, and ſo was not money had and received to the uſe of the plaintiff, and therefore he directed a nonſuit. A rule having been obtained on a former day in this term for ſetting aſide the nonſuit,

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Park and *Richardſon* now ſhewed cauſe. They obſerved that the action againſt the ſheriff was for an eſcape on meſne proceſs, in which the jury were not bound, as upon an eſcape out of execution, to give damages to the full amount of the debt. That is the diſtinction between actions for an eſcape on meſne proceſs, or an eſcape in execution: and the plaintiff is not prejudiced by not being allowed to recover in this action, for he has his remedy, 1ſt, by trover againſt the defendants if they withhold the bill, and afterwards by action on the bill itſelf; and this recovery againſt the ſheriff could not be pleaded in bar to ſuch action. If it ſhould be aſked whether the aſſignees, after having recovered the amount of the bill againſt the ſheriff for the tort, might ſtill recover againſt *Dufreſne*; it may be anſwered that it ſeems they might, becauſe the former recovery for the default of the ſheriff was collateral to the debt, and entirely matter of damages. In *Bonafous* v. *Walker* (*a*) *Buller* J. ſaid, that "at common law an action on the caſe only, "lay againſt the ſheriff or gaoler for an eſcape, in which "caſe the creditor might recover *damages* for the officer's "*miſconduct*; but ſtill he had a right to recover the debt "againſt the original debtor. But the ſtatutes gave an "action of debt againſt the ſheriff or gaoler to recover at "once the ſum for which the priſoner was charged *in* "*execution*." Now, this being an action for an eſcape from meſne proceſs, the ſtatutes do not apply: it is only an action at common law, and the damages given are for the miſconduct of the officer, and not in ſatisfaction of the debt; and therefore they cannot be conſidered as money had and received to the uſe of the plaintiff. It is

(*a*) 2 *T. R.* 129.

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a compenſation to the aſſignees for the injury ſuſtained by them, not by the plaintiff, between whom there is not any privity; and the aſſignees are accountable for the amount to the whole body of creditors. It is true that the aſſignees, according to *Alexander* v. *Macauley* (*a*), were bound to ſhew that ſomething was due upon the bill, but ſtill the debt due on the bill was not the cauſe of action, but the injury ariſing to them from the delay occaſioned by the eſcape. As to the converſation of the defendants' attorney, ſuppoſing it amounted to an agreement, it was not ſuch an agreement as was within the ſcope of his authority to make, and therefore will not vary the queſtion.

The Attorney-General and *Marryat*, contrà, ſaid, that the action for money had and received was an equitable action; that as it was not denied that the plaintiff might have brought trover againſt the defendants for this bill, if they had withholden it, ſo now when they have received the fruits of the bill it cannot be denied that he is at liberty to waive the tort, and inſtead of trover, to ſue for money had and received. If the plaintiff cannot recover in this form of action, the conſequence will be that the defendants will be enabled to retain in their hands a large ſum of money, to which they have no claim or color of right. The bankrupt held this bill as truſtee for the plaintiff, and if he had recovered upon it, he would have been compellable in equity to account with the plaintiff. Suppoſe the money had been paid into the bankrupt's hands for the honour of *Dufreſne*, could he have retained it? If not, what difference does it make

(*a*) 4 *T. R.* 611.

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in point of law, that instead of being paid for the honour of *Dufresne* it was paid by the sheriff? *Kitchin* v. *Campbell* (*a*) shews, that wherever a party receives the produce of property belonging to another, the law supposes him to have received it for the use of the person whose property it is, and that he may wave the tort and bring money had and received for it. And by the same case it appears that a recovery against the defendants in this action, will be a bar to any future action by the plaintiff on the same bill. There are many instances where payment by another is held to be equivalent to payment by the party himself, as payment by the bail, or by a sheriff to relieve himself from an attachment. Here the damages recovered were the fruits of the bill, which bill, it is admitted, belonged to the plaintiff.

Lord ELLENBOROUGH C. J. After the fullest consideration of this case, I confess that I still retain my original opinion, that the sum of money which the assignees of *Allder* have recovered in the action of tort against the sheriff, is not a sum to which the plaintiff *Randoll* is privy, so as to be in a situation to maintain an action at law, to recover it from the assignees. It is true that this court is much in the habit of exercising a very useful jurisdiction by staying proceedings in cases where the money has been paid over by the bail; and that is done upon application to the equitable jurisdiction of the court. But I cannot help thinking that there is great convenience in maintaining the simplicity of suits. If the money recovered by the assignees against

(*a*) 3 *Wils* 304.

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the ſheriff, which was recovered againſt him for his delinquency in an action brought by them on this bill, which bill was depoſited with the bankrupt, before his bankruptcy, and afterwards came into their hands, is money had and received to the uſe of the plaintiff, then if the bill had been taken by force from the perſon in whoſe hands it was depoſited, and he had brought treſpaſs for it, and recovered againſt the treſpaſſer damages combining the perſonal injury and the loſs of property, I am not prepared to ſay that ſuch damages might not alſo be money had and received to the plaintiff's uſe. But it may be ſaid the two caſes are not alike, becauſe here the damages were limited by the amount of the bill: but that I deny, for here the jury, if they thought that not the meaſure of damages, might alſo have given damages for the tort under all its circumſtances and aggravations. I am at a loſs then how to look into the minds of the jury, and to decompound their verdict, and pronounce how much they gave for loſs or delay of remedy, and how much in payment of the bill. Without the means of determining this, I cannot ſee what damages can be ſaid to be money recovered to the uſe of the perſon who depoſited the bill, and more eſpecially if, as it has been ſaid, the party ſtill has his remedy by trover or action on the bill. Neither do I think that the agreement of the defendants' attorney carries the caſe any further: an attorney may bind his client as to putting in bail and all the ordinary proceedings of a cauſe; but had he a right in this caſe to undertake for the defendants that they ſhould be liable to pay over all the money they ſhould recover, without being recouped any of their expences. It does not appear that any reſervation of that ſort was ſtipulated for,

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plaintiff. I ſhould therefore wiſh to have this caſe reconſidered.

BAYLEY J. It ſeems to me that the plaintiff is entitled to recover. I diſclaim all idea of confounding the diſtinction between courts of law and equity. A plaintiff here muſt undoubtedly ſucceed upon legal principles alone, and unleſs it appeared to me that this plaintiff could ſo ſucceed, I ſhould be indiſpoſed to permit the action. Here *Allder* held the bill as truſtee for the plaintiff, and had no right to ſue upon it, except as agent for the plaintiff; if the bill had been paid to him it would have been for the plaintiff's benefit, and *Allder*'s aſſignees ſtood in the ſame ſituation. Under theſe circumſtances they commence an action againſt *Dufreſne*, in *Allder*'s name; the ſheriff is guilty of an eſcape in that action, which entitles them to another action againſt the ſheriff. But on what ground were they ſo entitled? Not on the ground of being entitled in their own right; nor in right of *Allder* as principal, for no debt was due to him from *Dufreſne* in that character; but the only ground of action was, their having been prevented from recovering what was due to the plaintiff. If the defendants had not ſhewn that ſomething was due upon the bill, they would have been non-ſuited in their action againſt the ſheriff. I agree that in that action the jury were not bound to give damages to the amount of the debt, but it has always ſtruck me that they were warranted in doing ſo. I ſhould have great difficulty in ſaying that *Allder* or his aſſignees could have recovered beyond the amount of the debt, with intereſt and coſts, more eſpecially where they only ſued as truſtees; for this is an action for ſatisfaction, not for vindictive damages.

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damages. The ſheriff is bound to put the party in the ſame ſituation in which he would have been had it not been for the eſcape; and can that extend to more than the payment of debt and coſts? When I ſee therefore that the jury have given a ſum greatly exceeding the coſts, muſt I not attribute ſome part of it to the debt? There is no colour for the aſſignees withholding the debt; it could only be recovered as a debt loſt to them, and it ſhall not be permitted to them afterwards to turn round and ſay that it is only damages for the delay in recovering the debt. It ſeems to me alſo that the recovery againſt the ſheriff would be a bar to any future action in *Allder*'s name againſt *Dufreſne* upon the bill. Suppoſe then the plaintiff, inſtead of *Allder*, had recovered againſt the ſheriff, and hereafter ſhould bring an action upon the bill againſt *Dufreſne*, would it not be a defence for him to ſtate that the plaintiff had already received the whole amount from the ſheriff; I think it would. Then what difference does it make that here the action was by *Allder* and his aſſignees, *Dufreſne* would ſtill have an equal right to anſwer, that the whole amount of the bill had been received from the ſheriff, by the aſſignees, as truſtees for the plaintiff. I am of opinion therefore that without violating any rule of law the plaintiff may be permitted to maintain this action. I do not ſay that he is entitled to the whole ſum which the defendants recovered from the ſheriff, for I think they have a right to retain their expences in that ſuit; but the plaintiff is entitled to the balance.

Per Curiam (*a*), Rule abſolute.

(*a*) *Dampier* J. was abſent.

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Monday, July 5th.

COHEN *againſt* ARMSTRONG.

Replication to a plea of infancy, that defendant, ſince the making of the promiſes, attained 21, and that before the exhibiting of the bill he ratified and confirmed the promiſes, is good after verdict, though it omit to allege that he ratified and confirmed after he came of age.

INDEBITATUS aſſumpſit for goods ſold and delivered. Plea, infancy. Replication, though true it is that the defendant at the time of making the promiſes in the declaration was within the age of 21, as the defendant hath in his plea alleged, yet the plaintiff ſays, that the defendant hath ſince the making of the ſaid promiſes attained the age of 21, and that *before the exhibiting of the bill* of the plaintiff, to wit, on the 1ſt of *January* 1813, at, &c., he the defendant aſſented to and then and there ratified and confirmed the ſaid ſeveral promiſes, and each and every of them. Rejoinder, that the defendant did not aſſent to, ratify, or confirm the ſaid ſeveral promiſes in manner and form as the plaintiff in his replication hath alleged. Verdict for the plaintiff. It was moved in arreſt of judgment on an exception taken to the replication, becauſe it only alleged that the defendant ratified the promiſes before the exhibiting the bill, but omitted to ſtate that he ratified them after he came of age.

The Attorney-General and *Comyn* ſhewed cauſe, and contended that however good the exception might have been upon ſpecial demurrer, or after judgment by default, it was cured by verdict; and they cited *Wine* v. *Ware* (*a*), and 1 *Williams' Saund.* 228. *n.*; for after verdict it ſhall be intended that every thing was proved, which was neceſſary to make good the defective allegation, if it be

(*a*) 1 *Sid.* 15.

defective;

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defective; and therefore that it was proved, if it were neceſſary, that the defendant ratified after he was of age. But it ſeems from the caſe of *Borthwick* v. *Carruthers* (*a*) that if it had been ſo alleged in the replication, it would have been unneceſſary to prove it; conſequently it cannot be neceſſary to allege it.

Park and *Reader*, contrà, denied that *Borthwick* v. *Carruthers* was an authority to ſhew that the replication need not allege that the defendant ratified after he came of age, for there it did ſo allege; and as far as it was in point, they ſaid it was againſt the intendment that the plaintiff proved at the trial that the defendant was of age, becauſe there it was held not to be neceſſary.

Lord ELLENBOROUGH C. J. This form of replication that the defendant ratified and confirmed the promiſe, is not according to the old form: I remember it uſed to be formerly that he promiſed after he became of age. And, ſtrictly ſpeaking, that is the more correct form; for no perſon ever ratifies in words his former promiſe, but he makes a new promiſe. To ſay that he ratified is an artificial inference from the fact: it is not a ratification unleſs done animo ratificandi; whereas it is in general only a new promiſe to pay. I think however this replication may be ſupported. Ratification and confirmation mean ſomething more than merely repeating the promiſe; and the jury have found that the defendant has ratified. What does that mean? It ſurely means that he rendered valid what was before done; and how could that be except by a valid act, which act would have

(*a*) 1 *T. R.* 648.

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been invalid, if he was then an infant. If the replication had alleged merely that he repeated the promiſe, it might have been different; but it alleges that he ratified; and I think that will do.

Per Curiam (*a*), Rule diſcharged.

(*a*) *Dampier* J. was abſent.

Tueſday, July 6th.

JOHN BELL *againſt* REID.
BELL and Others *againſt* BULLER.

A natural-born ſubject of this country, domiciled in a foreign country in amity with this, may lawfully exerciſe the privileges of a ſubject of the country where he is domiciled to trade with another country in hoſtility with this; therefore where plaintiff, a *Britiſh*-born ſubject domiciled in *America*, effected a policy of aſſurance on ſhip, freight, and goods, at and from *Virginia* to any ports in the *Baltic*, and the ſhip was captured in her way to *Elſineur*, in *Denmark*, *Denmark* being in amity with *America*, but at war with this country: Held that the plaintiff was entitled to recover.

THE firſt of theſe two actions was upon a policy of inſurance, effected on the 13th of *May* 1810, by *William* and *John Bell* and Co. (which was deſcribed as the uſual ſtyle and firm of the perſons reſiding in *Great Britain*, who received the order for and effected the policy,) on the ſhip *Imogene*, valued at 4500*l.*, and on freight valued at 2850*l.*, at and from *Virginia* to her port or ports of diſcharge in the United Kingdom, or any port or ports, place or places, in the *Baltic*, &c. with leave (inter alia) to touch at all ports, places, and iſlands, for any purpoſes whatſoever, and ſail to, and touch and ſtay at, any ports or places whatſoever, and to wait for information off any ports or places, &c. The intereſt was averred to be in the plaintiff *John Bell*, and the loſs to be by hoſtile capture.

At the trial before Lord *Ellenborough* C. J., at the *London* ſittings after *Michaelmas* term 1811, it appeared in evidence that the ſhip ſailed on the voyage in queſtion

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with a cargo of tobacco on the 25th of *February* 1810, and that the captain, having previouſly received inſtructions to wait off *Falmouth* for orders from the houſe of *William* and *John Bell* and Co. in *London*, as to the ſhip's port of diſcharge and ultimate deſtination, arrived off that port the latter end of *March*, and while laying on and off, received written inſtructions, dated on the 24th of that month, from the houſe of *William* and *John Bell* and Co., to proceed to *Gothenburg*, and there place himſelf under the directions of *T. M'Nae*, their agent. The ſhip accordingly proceeded, and arrived at *Gothenburg* on the 14th of *April*, and there received inſtructions in the firſt inſtance from *M'Nae* to proceed to *Stralſund*, a *Swediſh* port; but before the ſhip ſailed, *M'Nae* having received further inſtructions from *Beaſley* (*a*), who was one of the partners in the *London* houſe of *William* and *John Bell* and Co., but was then reſiding at *Hamburgh*, directed the captain to call at *Elſineur* or *Nyberg* (as the wind might favour him) *Daniſh* ports, for further orders from *Beaſley*. On the 22d of *April* the *Imogene* left *Gothenburg* on her way to *Elſineur* for orders, and on the next day was captured in the *Baltic* by a *Daniſh* privateer from *Elſineur*, carried into *Copenhagen* and ultimately condemned there, by a ſentence pronounced in the prize court there, as engaged in commerce of a hoſtile character. It further appeared that *John Bell*, the plaintiff, was a *Britiſh*-born ſubject, but had been reſident and domiciled in the United States of *America* for upwards of 20 years, and had become a citizen of thoſe States; that he was

(*a*) It did not appear in evidence whether *Beaſley* was a *Britiſh* or *American*, but he was now ſaid to be an *American*.

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a partner in the houſe of *William* and *John Bell* and Co, of *London*, of which houſe *Beaſley* alſo was a partner, who was then reſiding at *Hamburgh*. That at the time of the inſurance and down to the capture of the veſſel *America* was in amity with *Great Britain*, *Sweden*, and *Denmark*; and *Great Britain* was in amity with *Sweden*, but at war with *Denmark*: and this the captain knew. The ſhip had no *Britiſh* licence to trade with or go to an enemy's port. It was therefore objected at the trial that this ſhip, owned by *John Bell*, a *Britiſh* ſubject, though domiciled in *America*, could not lawfully go to an enemy's port *to call for orders*, without a licence from the crown, but that ſuch going was illegal and avoided the inſurance.

The ſecond action was brought by *John Bell* and others upon another policy on the goods loaded on board the ſame ſhip *Imogene*, and the proof in this caſe was the ſame as in the firſt, with the addition of a letter of the 13th of *April* 1810 from *Beaſley* at *Hamburgh* to his partner *Wm. Bell* in *London*, which was offered by the defendant in proof that the ſhip with her cargo had been ordered to proceed to *Elſineur* or *Nyberg* in *Denmark*, not merely for the purpoſe of receiving orders there as to her future deſtination, but for the purpoſe of trading or diſpoſing of her cargo there, if an advantageous opportunity ſhould occur. The letter was as follows:

"*Hamburgh*, 13th *April* 1810.

"By the mail of to-day I write to Mr. *M'Nae* to ſend the *Mars*, and the *Imogene*, or *Georgia Planter*, whichever arrives firſt, provided he cannot ſell immediately at *Gottenburg*, to *Elſineur* or *Nyberg* for my orders: once there, I have but little doubt ſhall be able to diſpoſe of the cargoes deliverable in ſome of the *Baltic* ports very advantageouſly.

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vantageouſly. A cargo was ſold that way the other day at 50 grotes; alſo the tobacco; we muſt not flatter ourſelves with making much on it," &c. (Signed *R. G. Beaſley.*) The objection taken upon this evidence was, that the going to *Elſineur for the purpoſe of trading*, was illegal, and avoided the inſurance. The plaintiffs however in both theſe actions took a verdict for the amount of the defendants' ſubſcriptions, his Lordſhip reſerving to the defendants the benefit of theſe objections upon a motion. A rule niſi was accordingly obtained in both actions in *Hilary* term 1812; againſt which, in the following *Eaſter* term, *The Attorney-General*, (*Gibbs*,) *Park*, and *J. W. Warren* ſhewed cauſe, and *Garrow*, *Holroyd*, and *Scarlett* were heard in ſupport of them. The caſes then cited, except the caſe of *M'Connel* v. *Hector* (*a*), were afterwards mentioned and commented on by the Court in giving judgment; in which judgment will alſo be found the principal arguments uſed at the bar. The Court took time to conſider.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court in ſubſtance as follows. This was a motion for leave to enter a nonſuit in an action againſt an underwriter upon a policy of aſſurance on ſhip and freight on the *Imogene*, (and there was alſo a policy on the goods, the ſubject of another action) at and from *Virginia* to her port or ports of diſcharge in the United Kingdom, or any port or ports in the *Baltic*. The intereſt was averred in *John Bell* of *America*, and the loſs was by capture. The ſhip after arriving and lying off *Falmouth*, received orders to go to *Gottenburg*, where ſhe arrived on the 14th of

(*a*) 3 *Boſ. & Pull.* 113.

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April 1810, and was proceeding thence to *Elſineur*, an hoſtile port, to get further inſtructions, when ſhe was captured by a *Daniſh* ſhip. The ſhip had received orders at *Gottenburg* to go to *Elſineur* for further orders from *Beaſley*, who was one of the houſe of *Wm. Bell* and Company. The captain knew that *Elſineur* was a hoſtile port. It did not appear that *W. Bell*, the partner reſident in *England*, was a partner in the houſe in *America*. A verdict was taken for the plaintiff, with liberty to move for a nonſuit, upon the point whether ſailing to *Elſineur*, a hoſtile port, for orders was illegal. The caſe was argued, and has been the ſubject of long and deliberate conſideration with us. The queſtion is, whether a natural-born ſubject of his majeſty domiciled in a neutral country, ſuch as the United States of *America* then were, can, in reſpect of ſuch his domicile, be entitled to enjoy the commercial benefits and privileges belonging to the citizens of that country, and be exempt from the diſabilities and reſtraints attaching on a natural-born ſubject of this country. In general it may be conſidered as illegal to touch at a hoſtile port in the courſe of the voyage. In Dr. *Edwards*'s Admiralty Caſes, p. 42. it is laid down by Sir *Wm. Scott* "that there is no rule more clearly eſtabliſhed in principle, than that the port of deſtination being an interdicted port, is the port of delivery of the cargo;" which, as I underſtand it, means that the cargo muſt be preſumed to be deſtined thither for the purpoſe of illegal trade. And Sir *Wm. Scott* adds, "that it is impoſſible to relax that principle; if it were once admitted that a ſhip may enter an interdicted port to ſupply herſelf with water, or on any other pretence, a door would be opened to all ſorts of fraud without the poſſibility of preventing them."

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them." Assuming then on general principles of reason and political convenience, that all intercourse with the ports of an enemy is illegal, for what purpose soever it may be, the question here is whether such resort in the case of a natural-born subject domiciled in a neutral country stands upon a different principle. The case of *Scott* v. *Schwartz*, *Comyn's Rep.* 677. is the first case where a question of domicile arose. That was a question whether the master and three-fourths of the mariners, who had come from *Riga* in *Russia*, could be considered as of the country from whence the ship came, some of them having been born out of the dominions of *Russia*, but being resident there. The Lord Chief Baron *Comyn*, in a most learned judgment, in which he considered the law of domicile with reference to the navigation act very much at large, declared himself of opinion that they were men of that country within the intent of the navigation act. The next case as to how far a *British*-born subject domiciled in the United States of *America* could be considered as a citizen of *America* for the purposes of commerce, so as to partake in the trade to the *East Indies*, by virtue of the treaty, in which the words are "that the citizens of the United States may trade between the said territories and the said United States," was the case of *Wilson* v. *Marryat*, 8 *T. R.* 31., which came on afterwards in error, 1 *Bos. & Pul.* 430. Lord *Kenyon* and the rest of the Court of King's Bench were of opinion that as *Collett* was a citizen of this country by birth, he could not throw off his allegiance to this country, but that he was also a citizen of *America* for the purposes of commerce, it being found that he had been adopted as a citizen of that country; and the circumstance of his

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being a natural-born subject here could not deprive him of the advantages of being a citizen of that country. In *Bos. & Pull. Eyre* C. J. said, "Upon what authority is it said that a natural-born subject of the king shall not trade to the *East Indies*, though he is an adopted subject of another country, whose subjects in general are allowed to trade to the *East Indies*? Shall it be enough to say the rest of the king's subjects are not allowed to trade to the *East Indies*, and therefore you being the king's subject shall not? He will answer, I have a privilege which the rest of the king's subjects have not. I am the king's subject, but I am also the subject of the United States, and *Great Britain* has granted to the subjects of the United States that they may trade. He may add, I have violated no law of my parent state in procuring myself to be received a subject of the United States. She encourages the practice, for she herself adopts the subjects of other states." But this case as well as that of *Scott* v. *Schwartz*, it has been truly said, neither expressly. nor necessarily establish more than this, that for ordinary commercial purposes, and the general objects of trade, a *British*-born subject is capable of becoming the adopted subject of another state, so as to enjoy the privileges of commerce allowed to that state. But when a war breaks out with the parent state, it is said that natural allegiance requires that he must abstain from any act which is contrary to the interests of the parent state; that trading with an enemy is an act of that description, affording aid and comfort to the enemy, and such trading, though not of a hostile nature, may be the means of carrying on a treasonable intercourse with the enemy. And the same reason extends to the natural-born subjects of any other state

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who have become the adopted ſubjects of our own country, if their parent ſtate become engaged in hoſtilities. Whether theſe conſequences have or have not in them ſo much probable danger as to require reſtriction is a queſtion of political expediency well worthy perhaps the attention of the legiſlature. In the mean time we cannot help remarking that the trading with an enemy by a natural-born ſubject has, under certain qualifications, been recognized, as appears by the caſe of the *Elizabeth*, cited in *Potts* v. *Bell*, 8 *T. R.* 556., before Sir *Thomas Deniſon* and another common law Judge, where the goods which had been taken as coming from an enemy's port were reſtored to a *Britiſh*-born ſubject, who was eſtabliſhed in a foreign country. Upon inquiry I find that a caſe has occurred at the Cockpit, before the preſent Maſter of the Rolls, in which preciſely the ſame point was decided, and in which his Honour concurred. Contemplating theſe uniform authorities, according to which a trading with an enemy by a *Britiſh*-born ſubject domiciled abroad, has been regarded as innocent, and entitled to protection from condemnation; it is impoſſible for us upon this occaſion to hold that theſe caſes were not well decided. This is only a motion for a nonſuit, and therefore reſerving to any one of us to conſider this queſtion if it ſhould be preſented to us in a more ſolemn form for our deciſion, we think that this rule for a nonſuit ought to be diſcharged.

There is a like rule pending in *Bell and Others* v. *Buller*.

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Tuesday, July 6th.

The KING *against* The Justices of SUSSEX.

A certiorari to remove an order of sessions confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case

D'OYLY renewed his application for a certiorari in this case (*a*), the six days notice having, since the former rule was discharged, been given to the justices, as required by stat. 13 *G.* 2. *c.* 18. *s.* 5. He urged as an excuse for the lateness of the application that the case had not been finally settled till the *Epiphany* sessions, before which time the parties could not come to the Court for the removal of the order; and the delay in settling the case was attributable entirely to the other side. Admitting in general that the six months would run from the time when the order of sessions was made, which in this case was at the *Michaelmas* sessions, still the above circumstances took it out of the general rule. He cited *Rex* v. *Winpenny*, 34 *G.* 1. where a similar application for removing an order for the maintenance of a bastard child was made after the six months, and allowed.

Lord ELLENBOROUGH C. J. The statute expressly requires that the certiorari shall be applied for within six calendar months after order made; and I think it will be attended with beneficial consequences if we put a strict interpretation upon this clause; as it will have a tendency to accelerate the settling of cases which are intended to be brought up for our revision.

BAYLEY J. In strictness the case ought to have been settled at the *Michaelmas* sessions, *sedente curiâ*.

Per Curiam, Rule refused.

(*a*) See ante, p. 631.

TIDMARSH *againſt* GROVER.

Tueſday, July 6th.

Where the drawer of a bill of exchange, accepted payable at *B.* and Co.'s; after keeping it three or four years indorſed it to plaintiff, eraſing the name of *B.* and Co., and ſubſtituting *E.* and Co. without the knowledge of the acceptor, *B.* and Co. having failed ſince the acceptance: Held that plaintiff could not recover againſt the acceptor.

ACTION by the indorſee againſt the acceptor of a bill of exchange. At the trial before Lord *Ellenborough* C. J. at the *London* ſittings after *Eaſter* term, it appeared that the bill was originally accepted by the defendant, payable at *Bloxam*'s and Co., with whom the defendant then kept caſh. The drawer of the bill kept it in his hands three or four years after the acceptance, and then indorſed it to the plaintiff for a valuable conſideration, at which time he eraſed the name of *Bloxam* and Co. and inſerted that of *Eſdaile* and Co. in lieu of it, without the knowledge or conſent of the defendant. The houſe of *Bloxam* and Co. had failed in the interval between the acceptance of the bill, and the above alteration made upon it. Under theſe circumſtances it was contended that the defendant was diſcharged by the alteration, and *Rex* v. *Treble* (*a*) was cited. His Lordſhip reſerved the point, and the plaintiff recovered a verdict; and on a former day in this term a rule niſi was obtained for entering a nonſuit.

Park and *Reader* now ſhewed cauſe, and diſtinguiſhed this caſe from *Rex* v. *Treble*, and *Saunderſon* v. *Bowes* (*b*), in which it was decided that the place of payment was a material part of the inſtrument, inaſmuch as thoſe were caſes of promiſſory notes, where the place of payment was in the body of the inſtrument. But in *Fenton* v. *Goundry* (*c*), which was the caſe of a bill of exchange,

(*a*) 2 *Taun.* 328. (*b*) 14 *Eaſt*, 500. (*c*) 13 *Eaſt*, 459.

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the Court held the place of payment to be immaterial. If the acceptance had been in blank, the insertion of a place where the bill was to be paid would not have made it void, *Trapp* v. *Spearman* (*a*), and *Marson* v. *Petit* (*b*): and what difference is there in effect between inserting a place where none before existed, and altering one which did exist. So in *Kershaw* v. *Cox* (*c*) *Le Blanc* J. ruled that the insertion of the words "or order" did not vitiate the bill.

The Attorney-General contrà, argued that *Trapp* v. *Spearman*, and *Marson* v. *Petit* were not authorities to govern this case, because there the insertion of the place of payment after acceptance was only by way of memorandum; and that was the ground on which those cases proceeded, though it was not so stated in the note of them.

Lord ELLENBOROUGH C. J. If nothing more appeared than what appears by the note of *Marson* v. *Petit*, I should say that case was wrongly decided, as at present advised, but probably it was as suggested by *The Attorney-General* not written immediately under the acceptance, but only a memorandum where to find the money when the bill became due. Here if the alteration led to no other consequence than this, that the holder might have protested the bill for nonpayment at a place where the acceptor had never made it payable, and thereby put the party to an additional expence, that would be a sufficient objection. But it goes further, and causes the bill to carry with it the appearance of solvency by being directed to *Esdaile* and Co., a solvent house, instead of *Bloxham* and Co., an insolvent one: it purports to be an autho-

(*a*) 3 *Esp. N. P. C.* 57. (*b*) 1 *Camp. N. P. C.* 82. n.
(*c*) 3 *Esp. N. P. C.* 246.

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TIDMARSH *against* GROVER.

rity to the other houſe to pay the bill, and if that houſe had choſen ſo to underſtand it, and had paid the bill, the conſequence would be that the acceptor might have become liable to an action at their ſuit. It therefore holds out a falſe colour to the holder, and likewiſe varies the contract of the acceptor by ſuperadding an order upon another houſe to pay the bill, and therefore it ſeems to me to be a material alteration.

LE BLANC J. The alteration materially varies the contract of the party who accepted. It ſuperadds a reſponſibility being in the nature of a requeſt by the acceptor to the other houſe to pay the bill. And notwithſtanding the holder of the bill was not bound to go thither to demand payment, ſtill he might go thither, and if he had gone, and the bill had been refuſed payment, he might have proteſted it for non-payment. In *Kerſhaw* v. *Cox* the alteration was with the conſent of the defendant, and to correct a miſtake in furtherance of the original intention of the parties.

BAYLEY J. I am alſo of opinion that the alteration varies the reſponſibily of the party. Very poſſibly the words written by the drawer under the acceptor's name, in *Marſon* v. *Petit* were written in ſuch a manner as to ſhew that they were merely inſerted as a memorandum, and no part of the acceptance. If this alteration be good I do not ſee why an alteration to any diſtant place would not be equally good.

DAMPIER J. I concur in opinion with the reſt of the Court. The caſe of *Fenton* v. *Goundry* only decided that the holder need not go to the place; but he may go, and that is a ſufficient objection to this alteration.

Rule abſolute.

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Wednesday, July 7th.

MADDOX and Another *against* MILLER.

In an action for goods sold to an infant, the issue being *necessaries*, if any part of the articles proved to have been furnished to the defendant may fall within the description of necessaries, the evidence ought to be left to the jury.

ASSUMPSIT for goods sold and delivered. Plea, infancy. Replication, necessaries.

At the trial before *Bayley* J., at the last assizes for the city of *Worcester*, it appeared in evidence that the plaintiffs were tailors at *Worcester*, and had furnished the defendant with clothes. The defendant, at the time of the delivery of the clothes, was under age, but lived apart from his father in the employ of a considerable barge owner, at *Stourport-on-Severn*, and had since become a lieutenant in the *North Gloucester* militia. His father was a clergyman in *Gloucestershire*, about 20 miles from *Worcester*, with an income of 700*l.* per annum, having four daughters and two sons, of whom the defendant was the youngest, all dependant upon him for support. In *August* 1809 the defendant first employed the plaintiffs, and between that time and 1810 his bill for clothes amounted to 18*l.* 2*s.* 6*d.* On the 27th *September* 1810 he paid 15*l.* in part of the then debt, which left a balance of 3*l.* 2*s.* 6*d.* due to the plaintiffs. Between *October* 1810 and *February* 1811 other articles, consisting of superfine coats and the ordinary apparel worn by gentlemen, were furnished him, to the amount of 16*l.* 4*s.* 6*d.*, for the price of which, together with the balance of the former account, this action was brought. It did not appear what salary the defendant had during his employ at *Stourport*. The defendant was not introduced to the plaintiffs by his father, but had sent for one of them to the inn to give him his first order respecting the clothes. Objection was taken upon this evidence

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MADDOX *against* MILLER.

that it was not sufficient to go to the jury; inasmuch as there was no proof that the defendant was, at the time of the order, in need of clothing, nor that the clothes furnished were suitable to his condition in life, nor that he had any income to enable him to pay for them. The learned Judge, after hesitating on this objection, directed a nonsuit. A rule nisi was obtained in the last term for setting it aside; against which, on a former day in this term,

Dauncey and *Abbott* shewed cause, and contended that the affirmative of the issue being on the plaintiffs, they were bound to prove that the articles supplied were necessary and suitable to the estate and degree of the infant; which the evidence not only failed to prove, but proved the contrary; for it appeared that the defendant was provided with clothes at the time of the order, and the articles supplied were a description suitable to the highest rank. The defendant was also a stranger to the plaintiffs, and therefore they were bound, before they trusted him, to make inquiry, as was held by Lord *Kenyon* in *Ford* v. *Fothergill* (*a*), which might have easily been done, as the father lived but a short distance from them. The rules which formerly obtained for the protection of infants were more strict, and have already been sufficiently relaxed; in *Brooke* v. *Gally* (*b*) Lord *Hardwicke* said "The law lays infants under a disability of contracting debts except for bare necessaries, and even this exemption is merely to prevent them from perishing." And per-

(*a*) *Peake's N. P. C.* 229. 1 *Esp. N. P. C.* 211. S. C.
(*b*) 2 *Atk.* 35.

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MADDOX against MILLER.

haps the ſtrict rule would have been the beſt to adhere to.

Jervis and *Peake*, contrà, urged that the queſtion was not whether the evidence was ſufficient to warrant the jury in finding for the plaintiff, but whether it was ſufficient for them to deliberate upon; if it was, then the nonſuit was incorrect. The queſtion whether neceſſaries or not is a mixed queſtion of fact and law, and as ſuch ſhould be ſubmitted by the Judge to the jury, together with his directions upon the law; and it is of importance that this ſhould be obſerved, for the keeping diſtinct the province of the Judge and jury. In former caſes it has been the practice to leave this queſtion to the jury; Lord *Kenyon* did ſo in *Fothergill* v. *Ford*, and the jury found againſt his opinion; and in a late caſe, of *Leonard* v. *Roxburgh*, the ſame courſe was adopted by Lord *Ellenborough*. *Bainbridge* v. *Pickering* (*a*) ſeems to be the only caſe where the Court decided the queſtion upon affidavit, but there the infant was living with her mother; and in *Boringſale* v. *Greville* (*b*), *Somerſet* ſummer aſſizes 1810, cor. *Bayley* J. the queſtion was left to the jury, though the infant was living with his father.

Lord ELLENBOROUGH C. J. referred to *Clowes* v. *Brookes*, *Str.* 1101, and 9 *Viner*, 392., obſerving that *Strange* had not adverted to the caſe of *Rainsford* v. *Fenwick* (*c*), which in the margin of *Viner* appears to have been cited, and admitted per Cur. as a caſe in

(*a*) 2 *Bl. R.* 1325. (*b*) *Selwyn's N. P.* p. 119. 3d edit.
(*c*) *Carter*, 215.

point;

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point; and in which *Sife* Serjt. ſaid "theſe things of neceſſaries have been referred to the Judges and not to the jury;" and *Vaughan* C. J. and two other Juſtices obſerved, "Our being Judges of the neceſſaries is to the nature of the thing, not to the particulars, that indeed muſt be tried by a jury." His Lordſhip alſo mentioned *Mackerell* v. *Bachelor* (*d*), where the plaintiff brought aſſumpſit for the prices of a ſattin doublet and hoſe, with ſilver and gold lace; a velvet jerkin and hoſe, and a fuſtian doublet and cloth hoſe; the defendant pleaded infancy. Replication, that the defendant was a ſervant and attending upon the Earl of *Eſſex* in his chamber, and that the apparel was delivered to him for his neceſſary apparel during the time of his ſervice: upon demurrer, the Court cauſed the declaration to be read, and finding that the defendant was there written gentleman, agreed clearly that the ſattin, lace, and velvet were not neceſſary apparel for a gentleman, and therefore the action would not lie for ſo much, but only for the reſidue." But his Lordſhip added, that in general certainly the queſtion had been ſubmitted to the jury, with ſuch a direction from the Judge upon the law as the circumſtances required; and therefore if any part of the articles might be ſtrictly neceſſaries, it ought not to have been withdrawn from the jury.

The caſe ſtood over for ſome days, and now

Lord ELLENBOROUGH C. J. ſaid that the Court were of opinion, that this was not ſo purely and exclu-

(*d*) *Gouldſborough*, 168.

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fively a queſtion of law as that ſome queſtion ſhould not have been left to the jury; the nonſuit therefore muſt be ſet aſide, and a new trial had.

Rule abſolute.

Wedneſday, July 7th.

CRESWELL *againſt* HERN.

Same *againſt* DEALY.

Bail having rendered their principal within the eight days allowed by the rule of *Trin.* 1 *Ann.*, are not liable to the coſts in an action on the recognizance up to the time of the notice of render, when the proceedings were ſtayed.

THESE were rules niſi for referring it to the Maſter to tax the plaintiff his coſts in theſe actions upon the recognizance of bail, and alſo the coſts of his application. The plaintiff obtained final judgment in the original action, and iſſued a capias ad ſatisfaciendum returnable in eight days of the *Purification*, *Feb.* 9th, to which non eſt inventus being returned, on the 10th he commenced theſe actions and ſerved the defendants with a latitat. On the 16th of *February* the bail rendered the principal, and gave notice thereof to the plaintiff's attorney, whereupon further proceedings in theſe actions were ſtayed.

Lawes ſhewed cauſe, and relied on *Smith* v. *Lewis* (*a*) as being a later determination than *Hughes* v. *Poidevin* (*b*), on the authority of which this rule was obtained. He contended that as the Court in *Smith* v. *Lewis* allowed the bail to ſtay proceedings without payment of coſts, they muſt of neceſſity hold in this caſe that they were not liable to pay them; and he referred

(*a*) 16 *Eaſt*, 178. (*b*) 13 *Eaſt*, 254.

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CRESWELL *against* HERN.

to the rule of court, *Trin.* 1 *Ann.*, and said that in scire facias on the recognizance no costs were allowed.

F. Pollock, contrà, insisted that *Hughes* v. *Poidevin* was directly in point, and that the Court in *Smith* v. *Lewis*, though they were of opinion that the bail were entitled to have the proceedings stayed unconditionally on notice of the render, did not overrule the former case. Therefore, though the plaintiff is not at liberty, according to *Smith* v. *Lewis*, to require as a condition of staying the proceedings that his costs shall be paid, it is still open to him, according to *Hughes* v. *Poidevin*, to come to the Court by a separate motion for payment of his costs. And he said the rule of *Trin.* 1 *Ann.*, that all *further* proceedings shall cease, meant subsequent proceedings, and not the costs of former proceedings.

Lord ELLENBOROUGH C. J. There is not any condition in the rule respecting costs, the terms of which rule were expressly adverted to by the Court in *Smith* v. *Lewis*, and do not appear to have attracted their particular attention in *Hughes* v. *Poidevin*, although the rule itself is given by the reporter in a note. The rule states, that "if bail are impleaded in debt on the recognizance, they shall have eight days to render the defendant." The effect of this is to enlarge the time for rendering the principal eight entire days, giving the bail the indulgence of being in the same situation then as if they had rendered originally at the return of the writ. The rule goes on, "and *on notice thereof* all further proceedings shall cease." Such being the terms of the rule, how can the Court say that *all further* proceedings shall not cease until payment of costs. That would be im-

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CRESWELL *against* HEAN.

posing a new condition against the express language of the rule, which says, that upon notice of the render, all further proceedings shall cease. Then if the bail are still liable to be called on to pay the costs by this motion, they will be subject to a *further* proceeding.

LE BLANC J. If the Court had considered the bail liable for the costs in *Smith* v. *Lewis*, they ought to have made it a part of that rule.

Per Curiam, Rule discharged.

Wednesday, July 7th.

JOHN PHILLIPS Esq. and EMMA his Wife, and THOMAS SHRAWLEY VERNON Esq. *against* HENRY DEAKIN.

Devise to the use of testator's daughter for life, remainder to her first and other sons in tail-male, remainder to her daughters in tail general, with like remainders to his niece, her sons and daughters severally and successively; and for default of such issue to such of the uses, for such of the intents, and subject to such limitations declared by the will of *T. V.* as shall be then existing, undetermined, or capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity will then admit: Held that *T. S. V.*, who would have taken a vested remainder in tail, and would then have been tenant in tail in possession under the will of *T. V.*, did not take any vested estate under the words of reference to the will of *T. V.*, during the life of the second testator's daughter.

THE Master of the Rolls directed the following case for the opinion of this Court:

Thomas Vernon, of *Hanbury*, in the county of *Worcester*, by his will, dated the 17th of *January* 1711, after giving certain annuities and legacies, devised all the rest and residue of his real estate, including the real estate in this cause, to trustees and their heirs, to the use of his wife for life, remainder to the use of *Bowater Vernon* for 99 years, if he should so long live, with a power of jointuring; remainder to trustees, during his life, to preserve contingent remainders; remainder to his first

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and other ſons in tail male, and in default of ſuch iſſue to *Wm. Vernon*, the brother of the ſaid *B. Vernon*, for 99 years, if he ſhould ſo long live, with like power of joinſturing; remainder to truſtees during his life, to preſerve contingent remainders; remainder to his firſt and other ſons ſucceſſively in tail male, *and in default of ſuch iſſue, to the ſaid* W. Vernon's *brother*, Thomas Vernon, *for his life, with remainder to his firſt and other ſons ſucceſſively* in tail male, with a like power of making a jointure; and in default of ſuch iſſue, then to other perſons, with an *ultimate limitation to the teſtator's own right heirs*. The wife of the teſtator died in his lifetime, and in 1720 the teſtator died; upon whoſe death *Bowater Vernon* entered upon, and continued until his death in poſſeſſion of all the teſtator's real eſtates compriſed in the ſaid will. *B. Vernon* died in 1735, leaving a ſon, *Thomas Vernon*, who on his father's death entered upon and became poſſeſſed of the ſaid real eſtates. In 1745 the ſaid *Thomas Vernon* ſuffered a recovery of all the real eſtates deviſed as aforeſaid, and declared the uſes of ſuch recovery to himſelf in fee; and being ſo ſeiſed in fee of the eſtate in queſtion, by his will, dated the 23d of *September* 1771, he gave and deviſed all and every his manors, advowſons, meſſuages, farms, lands, tenements, and hereditaments whatſoever and wheresoever, late the eſtate of *Thomas Vernon*, deceaſed, (the firſt teſtator,) and alſo all other his (the ſecond teſtator's) real eſtate, whatſoever and wheresoever, unto the Hon. *J. York* and *R. Lygon*, their heirs and aſſigns, to the uſe of two perſons, their executors, &c. for a term of 500 years, upon certain truſts therein declared, and from and after the determina-

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termination thereof, *to the uſe of his (the ſecond teſtator's) firſt and other ſons ſucceſſively in tail male*, and for default of ſuch iſſue, *to the uſe of his daughter* Emma Vernon (now the plaintiff *E. Phillips*) and her aſſigns for the term of *her natural life*, without impeachment of waſte, and with ſuch leaſing powers as therein are expreſſed, remainder to the uſe of the ſaid *J. York* and *R. Lygon* during the life of *E. Vernon*, upon truſt to preſerve contingent remainders; *and from and immediately after the deceaſe of the ſaid* E. Vernon, *to the uſe of her firſt and other ſons ſucceſſively in tail male*, and for default of ſuch iſſue to the uſe of her firſt daughter in tail male, and for default of ſuch iſſue to the uſe of the ſecond and all other her daughters ſeverally and ſucceſſively in tail general, and for default of ſuch iſſue to the uſe of the ſecond and all other the ſecond teſtator's daughters ſeverally and ſucceſſively in tail general, and for default of ſuch iſſue to the uſe of his wife during her life, without impeachment of waſte; and after the deceaſe of his wife, to the uſe of his niece *E. J. L. Maude* for life, remainder to the uſe of the ſaid truſtees during her life, upon truſt to ſupport contingent remainders, and from and after her deceaſe to the uſe of her firſt and other ſons in tail male, and for default of ſuch iſſue to the uſe of her firſt, ſecond, and all and every other her daughters ſeverally and ſucceſſively in tail general, and *for default of ſuch iſſue* he deviſed all his ſaid real eſtates "*to ſuch of the uſes, for ſuch of the intents and purpoſes, and under and ſubject to ſuch of the limitations, powers, proviſoes, conditions, and agreements mentioned and declared in and by the ſaid will of my late couſin* Thomas Vernon (the firſt teſtator) *as ſhall be then exiſting undetermined, or capable*

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capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity will then admit of."

Thomas Vernon (the second teſtator) died in 1771, leaving his daughter *E. Vernon* (now *E. Phillips*) him ſurviving, which *E. Phillips* has no iſſue. The niece *E. J. L. Maude* is dead without iſſue. The plaintiff *Thomas Shrawley Vernon* is the eldeſt ſon and heir of *Thomas Vernon*, who was the eldeſt ſon and heir of *Thomas Vernon*, the third tenant for life under the will of *Thomas Vernon* the firſt teſtator, and would now have been the tenant in tail in poſſeſſion of the real eſtates given under the limitations of that will, if ſuch limitations had not been barred by the recovery ſuffered by *Thomas Vernon*, the ſecond teſtator.

The queſtion is, whether the plaintiff, *Thomas Shrawley Vernon* has now, under the will of *Thomas Vernon*, the ſecond teſtator, a veſted eſtate tail in remainder in the real eſtates deviſed by the will of *Thomas Vernon* the ſecond teſtator; or whether, under the words of reference from the will of *Thomas Vernon* the ſecond teſtator, to the uſes in the will of *Thomas Vernon* the firſt teſtator, no eſtate is to veſt until all the prior and ſpecific limitations contained in the will of *Thomas Vernon* the ſecond teſtator, ſhall have determined or failed of effect.

Preſton, for the plaintiff, contended that *T. S. Vernon* took a veſted remainder in tail under the will of *T. Vernon* the ſecond teſtator, and for maintaining this he argued that it was a rule of law not to conſtrue a limitation in a will as a contingent remainder, if it be capable

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of being considered as vested; on which rule, he said, the case of *Doe* v. *Maxey* (*a*) was decided: and there was also another rule that words, though apparently, sounding in future, shall be construed as giving a present interest, if the intent, as it is to be collected from the context, so requires; and for this he cited *Braston*'s case (*b*), *Bromfield* v. *Crowder* (*c*), and *Doe* v. *Nowell* (*d*). As to the intent, he said that the plaintiff *T. S. Vernon* would now have been tenant in tail in possession, under the first will, and that the intent of the second testator was not to alter the effect of the devises contained in the first will, any farther than by postponing them in favour of his own children and niece, and their families; after which he meant to restore the order of succession to its former channel under the first will. Therefore the devise upon default of issue of his children and niece "to such of the *uses* for such of the intents, &c. in the will of the first testator as shall be then existing undetermined or capable of taking effect," &c. was not meant to describe the person who should take when the preceding estates determined, but merely to designate the uses. And this construction of the devise is confirmed by the concluding part of it, which is in the ordinary language of conveyancers, when they would direct executory estates with reference to existing uses. The devise is not only "to such of the uses, &c. in the will of the first testator as shall then be existing undetermined or capable of taking effect;" but it goes on, "or

(*a*) 12 *East*, 589. (*b*) 3 *Rep.* 19.
(*c*) 1 *N. R.* 313. (*d*) 1 *M. & S.* 327.

as

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as near thereto as the deaths of parties and other intervening accidents and contingencies and the rules of law and equity will admit;" the obvious ſenſe of which is to deſcribe an order of ſucceſſion as near as poſſible to the will of the firſt teſtator, as if the ſecond teſtator had ſaid it ſhall go on in the ſame line as far as events will permit. The conſequence of holding this a contingent remainder will be to ſuſpend the power of alienation perhaps for centuries; and alſo to make the ultimate limitation to the right heirs of the firſt teſtator contingent: for that limitation is dependent on the words of reference, and cannot take effect, as in *Doe* v. *Maxey*, without them.

Scarlett contrà, admitted that the law rather inclined to the veſting of eſtates than ſuffering them to remain in contingency, and that in the conſtruction of wills a remainder might be either veſted or contingent, according to the intention of the teſtator, and that if the words were ambiguous, the Court would conſtrue them ſo as to effectuate the general intent. He ſaid that it was not denied on the one ſide that the form of words was applicable rather to contingent than veſted eſtates, and on the other, he admitted that the teſtator intended that after the failure of a certain claſs of perſons whom he had interpoſed, the limitations in the firſt will, as far as could be, ſhould take effect. But the queſtion is when are they to take effect, whether at the death of the teſtator or not until the failure of iſſue of the daughter? It is ſubmitted that the latter is the period to which the words of reference point. The words are, "to ſuch

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PHILLIPS *against* DEAKIN.

such of the uses, &c. as shall be *then* existing." When? The will expressly states, viz. on default of issue of the daughter or niece; that constitutes a contingent remainder: it goes on "or as near thereto as the deaths of parties, &c. will then admit;" why contemplate the deaths of parties if he meant to give vested remainders? If it had been to such *persons* instead of such *uses*, there would have been no doubt, and whatever ambiguity that word may raise is done away by the context; which taken together means that the limitations over shall not become vested till failure of issue of the daughter. If it were otherwise the tenant for life joining with the remainder-man, might defeat the subsequent limitations. The case of *Doe* v. *Mackey* was not decided on the construction of the will.

Preston in reply, cited the case of *Carwardine* v. *Carwardine* (*a*), and relied as before on the rule of law which inclined to accelerate the vesting of estates, and urged that the Court would therefore construe the words of this will as descriptive of the time of taking, and not of the persons to take; and he compared it to a limitation to *A.*, remainder to the right heirs of *B.*, which he said was a vested remainder in *B.*'s right heir, without waiting for the death of *A.*, and yet it was uncertain who would be the right heir of *B.* at the death of *A.*

The following certificate was sent.

(*a*) *Fearn's Exec. Dep.* 4th, edit. 5.

This

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PHILLIPS *against* DEAKIN.

THIS case has been argued before us by counsel, we have considered it, and are of opinion that under the words of reference from the will of *Thomas Vernon*, the second testator, to the uses in the will of *Thomas Vernon* the first testator, no estate has vested in *Thomas Shrawley Vernon* by virtue of the will of *Thomas Vernon* the second testator.

ELLENBOROUGH.
S. LE BLANC.
J. BAYLEY.
H. DAMPIER.

July 7th, 1813.

Wednesday, July 7th.

On the Part of JOHN BELL, REUBEN GAUNT BEASLEY, and WALTER BELL, who have survived WILLIAM BELL, deceased; and of the said R. G. BEASLEY, Administrator of the Estate and Effects of the said WILLIAM BELL, who died intestate, in the Matter of WILLIAM SCOTT, a Bankrupt.

THE Lord Chancellor directed the following case for the opinion of this Court:

Money advanced to *S.* by *B.* one of several partners out of the partnership funds, on account of payments to be made on policies of assurance underwritten by *S.* on account of himself and *B.* in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, was held not proveable under the commission of *S.*, who became bankrupt, by the surviving partners of *B.*

J. BELL, R. G. Beasley, Walter and *William Bell*, deceased, carried on business in partnership, as factors, in *London*, under the firm of *William* and *John Bell* and Co. *William Bell* was the only partner resident in *London*, and the concerns of the partnership there

were

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Ex parte BELL and Others in Re SCOTT (Bankrupt).

were solely managed by him. On the 1st of *January* 1809 *William Bell* and *Scott*, the bankrupt, verbally agreed to become interested in partnership, as to profit and loss on policies of insurance on marine risks to be subscribed by *Scott*, in his own name. And on the 1st of *January* 1810 it was farther verbally agreed between them, that such partnership should be extended as well to policies to be subscribed by *Scott* for *William Bell*, as to policies to be subscribed by *Scott* in his own name. For some time previously to the year 1809 *William Bell* had been in the habit of advancing money out of the funds of the said house of *Bell* and Co. to *Scott*, for his accommodation. The sums so advanced in the year 1808 amounted to 5503*l.* 16*s.* 9*d.*, and the balance due from *Scott* to the house of *Bell* and Co. on account of such advances at the end of that year amounted to 317*l.* 14*s.* 11*d.* In the course of the years 1809 and 1810 *Scott* continued to apply to *William Bell* from time to time for advances of money; in consequence of which application *William Bell* in the year 1809 advanced money to *Scott* from time to time out of the funds of the house of *Bell* and Co., to the amount of 10,592*l.* 17*s.* 3*d.*, which amount was reduced by repayments in the course of that year, leaving a balance at the end of the year 1809, due from *Scott* to *Bell* and Co., on account of such advances, of 5077*l.* 12*s.* 10*d.* including therein the sum of 317*l.* 14*s.* 11*d.* remaining due at the end of the year 1808 as aforesaid. And in the year 1810, previously to the 31st day of *August* in that year, (on which day *William Bell* died,) *William Bell* advanced money to *Scott* from time to time out of the funds of the house of *Bell* and Co. to the amount

of

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of 6280*l.* 6*s.* 10*d.*, which amount was reduced by repayments from time to time, leaving a balance on the 31ſt of *Auguſt*, due from *Scott* to the houſe of *Bell* and Co. on account of ſuch laſt-mentioned advances of 4418*l.* 3*s.* 7*d.*, making together with the balance due at the end of the year 1809, the ſum of 9495*l.* 16*s.* 5*d.* Of the monies ſo advanced to *Scott* in the years 1809 and 1810 the whole, except the ſaid ſum of 317*l.* 14*s.* 11*d.* was on account of *payments to be made* on policies of inſurance underwritten by *Scott* on the partnerſhip account between him and *William Bell* in purſuance of the verbal agreements ſo made between them, but no ſpecific ſum was applied for by *Scott*, or advanced to him for any ſpecific loſs or payment on any particular policy. The advances of money were all made by *William Bell*, by drafts in the firm of *Bell* and Co. on their bankers. No profits have accrued upon the underwriting of ſuch policies.

The queſtion for the opinion of the Court is, Whether under the circumſtances above ſtated, the ſaid *J. Bell*, *R. G. Beaſley* and *Walter Bell*, as ſurviving partners of the ſaid *William Bell* are, or the ſaid *R. G. Beaſley*, as adminiſtrator of the eſtate and effects of the ſaid *William Bell*, is entitled to prove under the commiſſion of bankruptcy iſſued againſt the ſaid *William Scott*, the whole or any and what part of the ſaid ſum of 9495*l.* 16*s.* 5*d.*, the balance remaining unpaid of the monies advanced by the ſaid *William Bell* to the ſaid *William Scott*.

Wetherell on a former day in this term, argued on behalf of the parties claiming to prove under the commiſſion; and as to the balance of 317*l.* 14*s.* 11*d.* he ſaid, that it

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it could not be affected by the illegality of the contract between *Wm. Bell* and *Scott*, having been incurred before the exiſtence of that contract; and as to the remaining balance he ſaid it would be hard to implicate the other partners in the tranſaction, becauſe one of them made the advances out of the partnerſhip funds for the purpoſes of his own private ſpeculation. And he urged that there was no caſe like the preſent where the money had been held not recoverable by the other partners. In *Sullivan* v. *Greaves* (*a*), *Mitchell* v. *Cockburne* (*b*), *Aubert* v. *Maze* (*c*), and *Booth* v. *Hodgson* (*d*), it will be found that the actions were brought either for the recovery of loſſes paid, or of profits ariſing out of the illegal partnerſhip; ſo that in thoſe caſes to have permitted the plaintiffs to recover would have been to have enforced thoſe very agreements which the law had prohibited. But this claim is not to enforce the agreement, but is collateral to it, and it has never been decided that a loan of money, the object of which was only in an executory ſenſe for illegal purpoſes, might not be recovered back. If indeed a ſpecific ſum had here been lent on a ſpecific policy for the payment of a loſs accrued under it, that might have been different; but the caſe negatives that, and ſhews that the loan was a floating loan for general purpoſes, and it is not even ſtated that it was applied to thoſe purpoſes. But granting that ſome part of it was ſo applied, the parties claiming will be entitled to the reſidue. Suppoſe *A.* had advanced 10,000*l.* to *B.* on an illegal concern between them, and *B.* expends only 5000*l.*, would it not be againſt conſcience to allow *B.* to retain the reſidue? Or ſuppoſe *A.* had advanced the money partly on a legal and partly on

(*a*) *Park's Inſur.* 8. (*b*) 2 *H. Bl.* 379.
(*c*) 2 *Boſ & Pull.* 371. (*d*) 6 *T. R.* 405.

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an illegal concern, could *B.* refuse to account for the whole? In *Lacaſſaude* v. *White* (*a*) it was held that money paid upon an illegal conſideration might be recovered back; and though in *Howſon* v. *Hancock* (*b*) the Court reſolved otherwiſe, that was becauſe there the money had been paid over by conſent. And in *Steers* v. *Laſhley* (*c*), where Lord *Kenyon* would not permit the plaintiff to recover on a bill of exchange given for the differences paid in a ſtock-jobbing tranſaction, yet he ſaid that "if the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in queſtion for that ſum, then according to the principle eſtabliſhed in *Petrie* v. *Hannay* (*d*) he might have recovered;" thereby recognizing the poſſibility of a contract's exiſting collateral to the illegal contract. And in *Mitchell* v. *Cockburne*, *Eyre* C. J., adverting to *Faikney* v. *Reynous* (*e*), obſerves, "that thoſe caſes were one ſtep removed from the illegal contract itſelf, and did not ariſe immediately out of it." That is the deſcription of the preſent caſe; it is a contract collateral to, or rather independent of, the original tranſaction.

Puller, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. If there were any poſſibility of ſeparating the guilty from the innocent partner, the Court would gladly have caught hold of any circumſtance for that purpoſe. This however muſt be conſidered as if the claim were inſtituted in the name of all the partners for the benefit of the delinquent partner as well

(*a*) 7 *T. R.* 535. (*b*) 8 *T. R.* 575. (*c*) 6 *T. R.* 61.
(*d*) 3 *T. R.* 418. (*e*) 4 *Burr.* 2069.

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well as the reſt. The queſtion then comes to this, whether theſe advances could be recovered from *Scott*, the party to the illegal contract. How was the money advanced? If, as it has been contended, this were a loan of money on account generally, there would have been much in the argument; but it was not an advance for general purpoſes, but for the very purpoſe of carrying into effect this illegal traffic and concern between the partners. It was argued as if the purpoſe for which the money was firſt advanced was equivocal; that it was only upon *Scott*'s account and for his accommodation, but the latter part of the caſe expreſsly ſtates that the whole, except the ſum of 317*l.* 14*s.* 11*d.*, was on account of payments to be made on policies underwritten by *Scott* on the partnerſhip account between himſelf and *Wm. Bell*, although no ſpecific ſum was applied for or advanced to *Scott* in reſpect of loſs or payment on any particular policy. I take it for granted that this is the uſual way in which one partner makes advances to another, and this was not a tranſaction, as it has been put in argument, of a mixed nature, combining a legal as well as an illegal object, to the former of which theſe advances might be aſcribed; but the whole was illegal. Nor does this caſe fall within *Petrie* v. *Hannay*, and *Faikney* v. *Reynous*, as they were deſcribed by *Eyre* C. J., as being one ſtep removed from the illegal contract; it is to carry into effect the illegal contract itſelf. Under theſe circumſtances I think an action could not be maintained to recover back theſe advances. It is unneceſſary to go through the other caſes of *Mitchell* v. *Cockburne* and *Aubert* v. *Maze*. This is clearly an attempt to recover back money advanced for the furtherance and in the very execution of an illegal contract,

5 and

and if recoverable, ſo might money advanced for the purpoſe of carrying on a ſmuggling tranſaction. Theſe remarks do not apply to the ſum of 317*l.* 14*s.* 11*d.*, which was advanced before this illegal partnerſhip was entered into.

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LE BLANC J. The ſingle fact ſtated puts an end to the argument; for it is ſtated that the advances were on account of payments to be made on policies of aſſurance; which amounts to the ſame thing as if they had been made on a particular policy.

The Court ſent the following certificate:

THIS caſe has been argued before us by counſel; we have conſidered it, and are of opinion that *J. Bell*, *R. G. Bagley*, and *Walter Bell*, as ſurviving partners of *William Bell*, are entitled to prove 317*l.* 14*s.* 11*d.*, and no more, of the balance remaining unpaid of the money advanced by the ſaid *William Bell* to *W. Scott*, under the commiſſion iſſued againſt the ſaid *W. Scott*, and that *R. G. Bagley*, as adminiſtrator of the eſtate and effects of the ſaid *William Bell*, is not entitled to prove any thing under the ſaid commiſſion.

ELLENBOROUGH.
S. LE BLANC.
J. BAYLEY.
H. DAMPIER.

July 7th, 1813.

END OF TRINITY TERM.

AN

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AFFIDAVIT,

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WHERE an affidavit of debt contained no place in the jurat, but purported to be ſworn before the Chief Juſtice of the King's Bench of *Ireland*, and to be ſigned by him, and ſuch ſignature was verified by affidavit here: Held that it was ſufficient foundation for arreſting the defendant under a Judge's order on meſne proceſs. *French* v. *Bellew and Cullimore*, *E.* 53 *G.* 3. Page 302

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Where the grantor of an annuity by deed conveyed to the grantees all his eſtate in the intereſt of 10,000*l.*, in truſt for himſelf until default in payment, and after default to retain thereout the arrears, &c., and after retaining the arrears, upon further truſt for himſelf: Held that a memorial, which ſtated that the intereſt of the 10,000*l.* was by the deed conveyed to the grantees *upon the truſts thereby declared*, was defective; although the grantor had not the legal eſtate in the intereſt of the 10,000*l.* at the time of his conveyance of it to the grantees, but the ſame was veſted in truſtees in truſt for him, after deducting certain annual payments, and the truſtees did not join in conveying their intereſt to the grantees. *Leyceſter and Others* v. *Lockwood*, *E.* 53 *G.* 3. Page 527

APPEAL.

See JUSTICES, 1, 2. MANDAMUS, 4, 5. NOTICE, 1, 2.

Where an order of removal was made and executed on the day before the holding of the *Epiphany* ſeſſions, and the pariſh to which the pauper was removed, gave due notice and entered their appeal at the *Eaſter* ſeſſions, at which ſeſſions the juſtices refuſed to hear the appeal, on the ground that it ſhould have been entered at the *Epiphany* ſeſſions; this Court granted a mandamus to the juſtices to receive ſuch appeal, notwithſtanding it appeared that the *Epiphany* ſeſſions continued for fourteen days, and were afterwards twice adjourned to diſtant days, and that it was the practice of the ſeſſions to allow appeals to be entered at any time during their continuance, or at the adjournments, and to reſpite the hearing to the next ſeſſions. *The King* v. *The Juſtices of Surrey*, *E.* 53 *G.* 3. Page 479

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See SETTLEMENT BY APPRENTICESHIP, 1. SETTLEMENT BY HIRING AND SERVICE, 2.

In an indenture of apprenticeſhip a covenant by the apprentice to allow his maſter 2*s.* per week, and to have wages, and provide for himſelf during the term, does not require the additional ſtamp required by 44 *G.* 3. *c.* 98. upon an indenture where a ſum of money is contracted for with the apprentice. *The King* v. *The Inhabitants of the Townſhip of Bradford*, *H.* 53 *G.* 3. 151

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1. Where the maſter of the plaintiffs' ſhip entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the houſe of *M.* and Co., for the delivery of goods upon a ſtipulated freight, and the goods were delivered to *M.* and Co. who were the conſignees named in the bill of lading: Held that the plaintiffs could not maintain *aſſumpſit* againſt the defendant for the freight. *Schuck and Another* v. *Anthony*, *T.* 53 *G.* 3. 573

2. Where the plaintiff, a druggiſt, after the 42 *G.* 3. *c.* 38., but before the 51 *G.* 3. *c.* 87., ſold and delivered drugs to the defendant, a brewer, *knowing that they were to be uſed in the brewery*: Held that he could not recover the price of them. *Langton and Others* v. *Hughes and Another*, *T.* 53 *G.* 3. 595

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ATTORNEY.

1. The lien of the plaintiff's attorney upon the debt and coſts recovered in the cauſe after affirmance upon writ of error, muſt be ſatisfied before the defendants are entitled to ſet them off againſt a judgment recovered by them in another cauſe againſt the plaintiff; and coſts in error are coſts in the cauſe. *Middleton* v. *Hill and Another*, *H.* 53 *G.* 3. Page 240

2. An attorney has a lien for his general balance on papers of his client which come to his hands in the courſe of his profeſſional employment; therefore where *C.* gave his attorney a ſpecific ſum for the purpoſe of ſatisfying a debt for which an execution had iſſued againſt his goods at the ſuit of *B.*, and the attorney paid the money to *B.*, who thereupon delivered to him a leaſe which had been depoſited by *C.* with *B.* as a ſecurity for the debt: Held that the attorney had a lien on it for his general balance due from *C.*; and that ſuch lien was not extinguiſhed by his having taken acceptances from *C.* for the amount of that balance before the leaſe came to his hands, ſome of thoſe acceptances when the leaſe did come to his hands having been diſhonored, and one of them taken up by the attorney. *Stevenſon and Another, Aſſignees of Collis, a Bankrupt*, v. *Blakelock, Gentleman*, *E.* 53 *G.* 3. 535

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1. Where a cauſe was referred under a Judge's order with a proviſo that the arbitrator ſhould make his award on or before a day certain; but if he ſhould not be then prepared, that the time ſhould be enlarged from time to time, as he might require, and a Judge of the court might think reaſonable and juſt: Held, that the time for making the award was duly enlarged by the arbitrator indorſing on the order, on the day preceding the expiration of the original time, that he required further time; although the Judge's order, granting ſuch further time, was not obtained until a day ſubſequent. *Reid* v. *Fryatt*, *H.* 53 *G.* 3. Page 1

2. Where two parties agreed to be bound by the opinion of a profeſſional man upon the conſtruction of an act of parliament, who gave his opinion in favour of one; ſuch opinion was conſidered as final and concluſive, though it recommended the printed ſtatute to be compared with the parliament roll before the matter was ſettled, under a doubt whether the ſtatute was not miſprinted. *Price* v. *Hollis*, *H.* 53 *G.* 3. 105

3. Where a verdict is taken for the damages in the declaration, ſubject to a reference of all matters in difference, the Court will not give leave to increaſe the ſum in the declaration and rule of reference on an affidavit that a larger ſum will probably be proved before the arbitrator. *Pearſe* v. *Cameron*, *T.* 53 *G.* 3. 675

4. It ſeems that under a reference of all matters in difference the arbitrator will not of neceſſity be confined to the amount of the damages for which the verdict is taken, *ib.*

BAIL.

See COSTS, 4.

1. If in a joint action againſt two the recognizance of bail be drawn up by miſtake in an action againſt one only, and the plaintiff after two writs of ſci. fa. againſt the bail, and nihil returned to them, ſign judg-

ment against the bail and take out execution, the Court will set aside the judgment and execution for irregularity. *Holt* v. *Frank and Another*, *H.* 53 *G.* 3. Page 199

2. Bail in error are not chargeable in an action upon the recognizance with mesne profits, where they have not been ascertained by writ of inquiry pursuant to 16 & 17 *Car.* 2. *c.* 8. *Doe* v. *Reynolds and Sawyer*, (*Bail in Error*,) *E* 53 *G.* 3. 247

3. Where the plaintiff in error within four days after being ruled to put in better bail, viz. on the day after *Hilary* term, gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term gave notice of fresh bail: Held that the latter bail were not entitled to justify, there being no reason assigned for the non-attendance of the former bail. *Lunn* v. *Leonard*, *E.* 53 *G.* 3. 366

4. Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the 1st day of the term: the Court would not permit the bail to justify. *Ostreich and Another* v. *Wilson*, *E.* 53 *G.* 3. 367. *n.*

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See BILLS OF EXCHANGE, 6. SET-OFF, 2.

BANKRUPT,

See PARTNERS, 2. SET-OFF, 4. TROVER.

1. Where, by agreement between *B.* and the defendant, *B.* agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, *B.* should be allowed to remain in possession for three months without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and *B.* afterwards left in possession according to the agreement, who became bankrupt whilst he so remained in possession, and before the expiration of the three months: Held that this was not a possession by the bankrupt within the statute 21 *Jac.* 1. *c.* 19. *s.* 11. *Muller and Another*, *Assignees of Meek, a Bankrupt*, v. *Moss*, *E.* 53 *G.* 3. Page 335

2. Where a trader, upon being arrested for a debt of 135*l.*, escaped from the officer and fled into the house of another, and was pursued by the officer and inquired for at the house, but was denied and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber: Held that this constituted one or more act or acts of bankruptcy, under the words of the statute, "beginning to keep house," or, "otherwise absenting himself;" and a creditor of the bankrupt, who had sued out a writ against him, and, without proceeding upon it, afterwards received from him a bill of exchange in part-payment of his debt, after being apprised that there had been a meeting of his creditors, and that the bankrupt's affairs at that time were only capable of paying the demands of his creditors by instalments, although he was assured by the bankrupt's agent that they would

would come round, was liable to refund the proceeds of such bill to the assignees of the bankrupt, as a payment not in the usual course of trade, and before notice of his insolvency. *Bayly and Others, Assignees of Luckraft, a Bankrupt*, v. *Schofield and Another*, E. 53 G. 3. Page 338

3. Where *S.* obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one which had been discounted), and also two bank notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against *S.*, the assignees under which commission brought trover against the defendant for the bills and bank notes: Held that the defendant was entitled to retain them. *Gladstone and Others, Assignees of James Sill and Wm. Watson, Bankrupts*, v. *Hadwen*, E. 53 G. 3. 517

4. Where *R.*, a tradesman, being arrested at the suit of the defendant upon a ca. sa., placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant: Held that the assignees of *R.*, who had committed an act of bankruptcy before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer and although the money paid to the defendant was not the identical money raised by the pledge. *Allanson and Another, Assignees of Roberts, a Bankrupt*, v. *Atkinson*, T. 53 G. 3. Page 583

5. Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home: Held that this was an act of bankruptcy within the words of 13 *Eliz. c.* 7. and 1 *J.* 1. *c.* 15. "otherwise absenting himself to the intent to delay creditors," although it appeared that not only no creditor was delayed, but that none could possibly be delayed. *Chenoweth* v. *Hay*, T. 53 G. 3. 676

BARON AND FEME,

See HUSBAND AND WIFE.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

See MONEY HAD AND RECEIVED, 3.

1. A presentment of a bill of exchange at a banking-house after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn from the circumstance of the bill being presented

sented by a notary, that it had been before duly presented within banking hours. *Elford and Others v. Teed, H.* 53 *G.* 3. Page 28

2. Where partners resident in *Ireland* signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to *B.* in *England* for his use, who filled up the blanks and negotiated it: Held, that this was to be considered a bill of exchange by relation from the time of the signing and indorsing in *Ireland*, and consequently that an *English* stamp was not necessary. *Smith and Others v. Mingay and Others, H.* 53 *G.* 3. 87

3. Where the drawer of a foreign bill of exchange at the time of the drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest was left at the drawer's house: Held that this was sufficient. *Robins v. Gibson, E.* 53 *G.* 3. 288

4. Where *S.* obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one which had been discounted), and also two banknotes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against *S.*, the assignees under which commission brought trover against the defendant for the bills and banknotes: Held that the defendant was entitled to retain them. *Gladstone and Others, Assignees of James Sill and William Watson, Bankrupts, v. Hadwen, E.* 53 *G.* 3. Page 517

5. Notice to the drawers of non-payment of a bill of exchange by sending to their counting-house, during hours of business on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Crosse and Others, Assignees of Fea and Others, Bankrupts, v. Smith, Thompson and Others, E.* 53 *G.* 3. 345

6. Persons who are bankers both for the drawers and acceptor of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptor to stop the payment of it at the place of payment, and do so accordingly, are not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill may look to the drawers, notwithstanding they have not given such notice: and they are not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers become bankrupt, it will constitute an item in the account between them and the bankers. *ib.*

7. Where the drawer of a bill of exchange, accepted payable at *B.* and Co.'s, after keeping it three or four years indorsed it to plaintiff, erasing the name of *B.* and Co., and substituting *E.* and Co. without

without the knowledge of the acceptor, *B.* and Co. having failed since the acceptance: Held that plaintiff could not recover against the acceptor. *Tidmarsh* v. *Grover*, *T.* 53 *G.* 3. Page 735

BISHOP.

A ſtatute made in 1663 by the Biſhop, with the conſent of the Chapter of *Exeter*, conferring upon every *canon* reſidentiary, who ſhould ceaſe to be ſuch by *promotion to a higher degree and dignity* in the Church of England (unleſs it be by *voluntary reſignation*, &c.) the right of receiving to his own uſe the whole profits and advantages of the canonry for the following year, ſuppoſing ſuch a ſtatute to be valid, is at all events contrary to the policy of the eccleſiaſtical eſtabliſhment, and to be conſtrued ſtrictly: therefore, where the defendant, who was Dean and Canon of that Chapter, reſigned the ſame in order to obtain promotion to another deanery, to which he was ſhortly afterwards promoted; it was held that he was not within the ſtatute, not having ceaſed to be a member of the former church by promotion to the latter, but having ceaſed to be ſo before his promotion: and beſides, his reſignation having been voluntary, he was expreſsly excluded by the terms of the exception; and a promotion from one deanery to another, ſeems not a promotion to a higher degree. The admiſſion of the plaintiff as Canon into plenum jus, although not made until a year after his firſt admiſſion, related back to the time when his title to the profits accrued, ſo as to enable him to maintain an action for them. *Garnett D. D.* v. *Gordon D. D.* *H.* 53 *G.* 3. 205

BOND.

1. A bond given to parish officers reciting that *B.* had taken a houſe in the pariſh for a term of 7 years, and conditioned to indemnify the pariſh againſt any charges which they might ſuſtain on account of *B.* and his family becoming inhabitants of and belonging to the pariſh, is not diſcharged by *B.*'s purchaſing an eſtate of the value of 30*l.* in the pariſh, and reſiding on it upwards of 40 days after the expiration of the 7 year's leaſe. *Edwards and another* v. *Bobbit*, *H.* 53 *G.* 3. Page 120

2. Where the putative father of a baſtard child gave a *voluntary* bond, and not under the compulſion of ſtat. 6 *G.* 2. *c.* 31., to the pariſh officers conditioned for the payment of a ſum certain every three months until the child ſhould be *deemed* capable of providing for herſelf: Held that ſuch bond was good, and the condition ſufficiently certain. *Middleham* v. *Bellerby*, *E.* 53 *G.* 3. 310

BRIDGE.

See INDICTMENT.

BRISTOL CANAL COMPANY.

See EVIDENCE, 5.

BROKER.

See SET-OFF, 13.

CANON.

See BISHOP.

CARRIER.

Where it was agreed between the plaintiff and one of the defendants, proprietors of a ſtage-coach, to carry certain parcels for the plaintiff free

free of expence, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for, &c. Held, that the defendants were not liable for the loss of a parcel of above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants. *Thomas Bignold and John Cocksedge Bignold* v. *William Waterhouse, John Waterhouse, Samuel Waterhouse, John Watson, and Thomas Coldwell*, *E.* 53 *G.* 3. Page 255

CERTIORARI.

1. A certiorari to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made, and six days notice of such motion must be given to the justices pursuant to 13 *G.* 2. *c.* 18. *s.* 5., notwithstanding the order of sessions was made subject to the opinion of this Court on a case to be stated, which case was afterwards stated, and settled by the justices at the sessions. *The King* v. *The Justices of Sussex*, *T.* 53 *G.* 3. 631

2. A certiorari to remove an order of sessions confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case. *The King* v. *The Justices of Sussex*, *T.* 53 *G.* 3. 734

CHARTER-PARTY.

See Assumpsit, 1.

The charterer of a ship from *L.* to *B.* and back, cannot plead to an action brought against him by the owner on the charter-party for not providing a sufficient cargo at *B*, that the ship sailed on the voyage from *L.* without convoy, contrary to the 43 *G.* 3. *c.* 57., and that the plaintiff was privy to and knew the same: it not being in the contemplation of the parties at the time of entering into the contract to violate the regulations of that act. *Wilson* v. *Foderingham*, *E.* 53 *G.* 3. Page 468

CLOTHIERS.

See Mandamus, 6.

COLLECTOR OF TAXES.

See Distress. 1.

The 23 *G.* 3. *c.* 90. *s.* 4., for paving and lighting the parish of *St. Martin*, which prohibits under a penalty any person during the time *he shall be collector of any tax*, or hold any office of profit, or be interested in any contract or work to be done in the execution of that act, from acting as a committee-man under the act, does not extend to a collector of the assessed taxes. *Lee* v. *Birrell*, *E.* 53 *G.* 3. 482

CONTRACT.

See Assumpsit, 2.

Where a person performed work for a committee, under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" Held that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. *Taylor and Another, Assignees of Walsh, a Bankrupt*, v. *Brewer and Others*, *E.* 53 *G.* 3. 290

CON-

CONVOY.

See CHARTER-PARTY, 1.

CORPORATION.

See MANDAMUS, 2, 7. Quo Warranto.

COSTS.

1. The lien of the plaintiff's attorney upon the debt and costs recovered in the cause after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff: and costs in error are costs in the cause. *Middleton* v. *Hill and Another*, *H.* 53 *G.* 3. Page 240

2. The prosecutor of an indictment for obstructing a highway must shew himself to be the party grieved in order to obtain costs under the 5 & 6 *W. & M. c.* 11. *s.* 3.: therefore where the prosecutor did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it: Held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expence. *The King, on the Prosecution of Sir Arthur Chichester*, v. *Incledon*, *E.* 53 *G.* 3. 268

3. Where the plaintiff in assumpsit failed to prove his special counts, but upon the common counts recovered less than 5*l.* upon the balance of an account which contained items both on the debet and credit side: Held that by 39 & 40 *G.* 3. *c.* 104. he was deprived of costs, it appearing that the defendant resided and traded in *London*. *Fonin* v. *Oswell and Another*, *E.* 53 *G.* 3. 393

4. The plaintiff in an action on the recognizance of bail, is not entitled to the costs up to the time of notice of render and staying proceedings if the bail render their principal within the eight days allowed by the rule of *Trin.* 1 *Anne*. *Graswell* v. *Hern*, *T.* 53 *G.* 3. Page 742

COVENANT.

1. Where a lessee of a house and garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the licence of the lessor," &c. and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises: Held that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants. *Doe on the demise of Bish* v. *Keeling*, *H.* 53 *G.* 3. 95

2. Where the plaintiff, *as executrix*, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of executing the deed seised in fee, and had a right to convey, &c.; and assigned for breach that the defendant was not seised, &c, and had not a right to convey, &c.: this was held ill upon special demurrer, and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Covenant upon request of the

the teſtator, his heirs or aſſigns, to make further aſſurance to the teſtator, his heirs and aſſigns, and breach aſſigned that the plaintiff, as executrix, requeſted the defendant to execute a releaſe between the defendant, the plaintiff, and *S. A.*, for farther aſſuring the premiſes to the uſes mentioned in the deed, which the defendant refuſed; without ſhewing that the plaintiff claimed an intereſt, or to whoſe uſe the releaſe was to enure, or why *S. A.* was a party to it; was conſidered ill on ſpecial demurrer. A demurrer for cauſe of miſjoinder of breaches of covenant muſt be to the whole declaration, and not to the breach alone which is miſjoined. *Eliz. Kingdon, Executrix, &c.* v. *Nottle, E.* 53 *G.* 3. Page 355

DEED,

See ASSUMPSIT, 1.

DEFEASANCE,

See WARRANT OF ATTORNEY.

DEVISE.

1. Deviſe to the uſe of *A. only ſurviving ſon of* J S., for life, and to his firſt and other ſons, &c., and for default of ſuch iſſue to the uſe of the firſt, ſecond, and of all and every other ſon and ſons of *J. S.* lawfully *to be begotten*, and the heirs male of the body of ſuch firſt and other ſons, with proviſo that the ſaid *A.* and his firſt and other ſons, and alſo the firſt and other ſons *hereafter to be born* of the ſaid *J. S* ſhould reſide at the family houſe, &c.: Held that the ſecond ſon of *J. S.*, *born before* the date of the will, ſhould take upon the death of *A.* without iſſue. *Doe on the ſeveral demiſes of William and Thomas James, otherwiſe Morgan* v. *Hallett, H.* 53 *G.* 3. 124

2. Deviſe of "all that my farm called *Trogues-farm*, now in the occupation of *A. C.*" is not neceſſarily limited to the lands of *Trogues* farm in the occupation of *A. C.*, but may be ſhewn by evidence to extend to other lands of *Trogues* farm not in his occupation. *Goodtitle, on the demiſe of Radford*, v. *Southern, E.* 53 *G.* 3. Page 299

3. Deviſe of all the teſtator's freehold eſtates to *J. S.* for life, and on his deceaſe to and among his children equally, at the age of 21, and their heirs, as tenants in common; but if only one child ſhall live to attain ſuch age, to ſuch child and his or her heirs, at his or her age of 21; and in caſe *J. S.* ſhall die without iſſue, or ſuch iſſue ſhall die before 21, then over: Held that the children of *J. S.* took a veſted remainder. *Doe, on the ſeveral and joint demiſes of John Henry Roake, Thomas William Roake, George Roake, and Elizabeth Roake*, v. *Nowell, E.* 53 *G.* 3. 327

4. Deviſe to the three ſiſters of the teſtator for and during their joint natural lives, and the natural life of the ſurvivor, *to take as tenants in common and not as joint tenants*; Remainder to truſtees during the reſpective lives of the ſiſters and the life of the ſurvivor, to preſerve contingent remainders; and from and after their reſpective deceaſes and the deceaſe of the ſurvivor remainder over: Held that the ſiſters either took the eſtate as joint-tenants to be regulated in its enjoyment as a tenancy in common, or as tenants in common with benefit of ſurvivorſhip. *Doe, on the dem. of Sarah Borwell*, v. *Abey, E.* 53 *G.* 3. 428

5. Deviſe of teſtator's leaſehold houſes, held for a term renewable, to *J. T. S.* to his own uſe and benefit on his attaining 21, upon truſt that his (the

(the teſtator's) truſtees ſhould pay and perform rents and covenants, and renew the ſame from time to time, and for that purpoſe to make ſurrender, &c, and alſo to permit the truſtees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to *M. P.* to keep the houſes during the minority paying rent to the truſtees, &c.: Held that this was in effect a deviſe to the truſtees during the minority, with a veſted remainder to *J. T. S.* the infant; and that the intereſt of *M. P.* ceaſed on the deceaſe of *J. T. S.* before 21. *Goodright on dem. of J. Revell, S. Revell, R. Cock, and of J. Steele* v. *Mary Parker and Others*, *T.* 53 *G.* 3. Page 692

6. Deviſe to the uſe of the teſtator's daughter for life, remainder to her firſt and other ſons and daughters in tail, with like remainders to his niece, her ſons and daughters ſeverally and ſucceſſively, and for default of ſuch iſſue to ſuch of the uſes, for ſuch of the intents, and ſubject to ſuch limitations declared by the will of *T. V.* as ſhall be then exiſting undetermined or capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity, will then permit: Held that *T. S. V.* who would have taken a veſted remainder in tail, and would have been tenant in tail in poſſeſſion under the will of *T. V.* took no veſted eſtate under the ſecond will, during the life of the ſecond teſtator's daughter. *Phillips and Another* v. *Deakin*, *T.* 53 *G.* 3. 744

DISTRESS,

See Notice, 1.

1. The collector of the houſe and window tax under 48 *G.* 3. *c.* 161. may diſtrain for arrears of thoſe taxes, the goods of a third perſon found on the premiſes charged, though the goods are only borrowed, and the perſon in arrear has other goods of his own on the premiſes ſufficient to ſatisfy the arrears. *Juſon* v. *Dixon*, *T.* 53 *G.* 3. Page 601

2. Where a ſheriff's officer executed a writ of fi. fa. by going to the houſe and informing the debtor he came to levy on his goods, and laying his hand on a table and ſaying, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away, without leaving any perſon in poſſeſſion, and after the fi. fa. was returnable, but not continued, the landlord diſtrained the goods for rent: Held that the ſheriff could not maintain treſpaſs againſt him. *Blades and Another* v. *Arundale*, *T.* 53 *G.* 3. 711

DRUGS,

See Assumpsit, 2.

ERROR, WRIT OF,

See Bail, 2, 3, 4.—Indictment, 1.—Practice, 3.

The clerk of the errors in *C. P.* in tranſcribing the record, by miſtake entitled it generally inſtead of ſpecially, and error was aſſigned thereon; after which he amended the tranſcript by inſerting the ſpecial memorandum: the Court would not reſtore the tranſcript to the ſtate in which it ſtood at the time when the plaintiff in error aſſigned his error. *Randole* v. *Bailey and Another: In error*, *H.* 53 *G.* 3. 232

EVI-

EVIDENCE,

See SLANDER, 1, 2. TROVER.

1. Where the plaintiffs filed a bill in Chancery for the examination of a witneſs de bene eſſe, to which the defendant did not put in any anſwer, and the plaintiffs afterwards obtained an order of the Court for the examination of the witneſs, and gave notice thereof to the defendant, and of the interrogatories intended to be put, and on the ſame evening examined the witneſs, who left *London* the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the depoſition of the witneſs ſhould be publiſhed in order that it might be read in evidence at the trial: Held that the depoſition was admiſſible evidence at the trial, for as the defendant had notice of the time of the examination, he might have croſs-examined at that time, or applied for further time for that purpoſe; and it muſt be preſumed from his not having done either, that he did not wiſh to croſs-examine. *Cazenove and Another* v. *Vaughan*, *H.* 53 *G.* 3. Page 4

2. Upon a queſtion whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to ſhew by parol evidence that there was a known diſtinction within the manor between OLD and *new land*, and that in fact the plaintiff's lands lay within the boundary of the *new* land; and alſo to ſhew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the ſame boundary, that the right to the coals under the plaintiff's lands was in the lord. *Barnet* v. *Mewſon*, *H.* 53 *G.* 3. 77

3. Where a contract was made by one of ſeveral partners in his individual capacity, who at the time declared that the ſubject-matter of the contract was his property alone: Held that his declaration was evidence againſt all the partners, and therefore they could not ſue jointly upon ſuch a contract. *Lucas and Others* v. *De la Cour*, *E.* 53 *G.* 3. Page 249

4. Deviſe of "all that my farm called *Trogues-farm*, now in the occupation of *A. C.*," is not neceſſarily limited to the lands of *Trogues-farm* in the occupation of *A. C.*, but may be ſhewn by evidence to extend to other lands of *Trogues-farm* not in his occupation. *Goodtitle, on the Demiſe of Radford*, v. *Southern*, *E.* 53 *G.* 3. 299

5. By the 51 *G.* 3. *c.* 60. (local act) the regiſter book of the *Briſtol* Canal Company is evidence, in an action brought by them for calls, of the defendant's being proprietor of the number of ſhares affixed to his name. *The Briſtol and Taunton Canal Navigation Company* v. *Lamb*, *T.* 53 *G.* 3. 569

6. The ſheriff's return to a writ of fi. fa. that he has levied the money, is not ſufficient evidence to prove that he has paid it over to the judgment-creditor ſo as to charge the latter with the receipt of it, in an action for money had and received. *Cator, Aſſignee of Sparkes, Bankrupt*, v. *Stokes, Gent.*, *T.* 53 *G.* 3. 599

7. Upon appeal againſt an order of removal the declarations of a rated inhabitant of the appellant pariſh are evidence againſt that pariſh, without calling the inhabitant and ſhewing that he refuſed to be examined. *The King* v. *The Inhabitants of Whitley Lower*, *T.* 53 *G.* 3. 636

8. Treſpaſs quare clauſum fregit. Plea, of preſcriptive right of common over the locus in quo at all times for his cattle, levant and couchant;

couchant; replication, preſcribing in right of his meſſuage to uſe the locus in quo for tillage with corn, and until the taking in of the corn to moſs and enjoy the ſame in every year, and traverſed the defendant's preſcription; on which iſſue joined: Held that many perſons beſides defendant having a right of common over the locus in quo, evidence of reputation as to the right claimed by plaintiff was admiſſible, a foundation being firſt laid by evidence of the enjoyment of ſuch right; and that plaintiff's right might legally exiſt as a qualification of defendant's right, and was not repugnant to it. *Weeks* v. *A. Sparke, W. Sparke, and W. Sparke, Jun.* T. 53 G. 3. Page 679

EXECUTION.

See Bail, 1. Rent. Sale.

EXECUTOR.

See Covenant, 2. Pleading, 2.

Where the executors of a deceaſed partner continued his ſhare of the partnerſhip property in trade for the benefit of his infant daughter: Held that they were liable upon a bill drawn for the accommodation of the partnerſhip, and paid in diſcharge of a partnerſhip debt; although their names were not added to the firm, but the trade was carried on by the other partners under the ſame firm as before, and the executors when they divided the profits and loſs of the trade, carried the ſame to the account of the infant, and took no part of the profits themſelves. *Wightman* v. *Townroe, Dickons, Thomas and James Watſon, and Arum*, E. 53 G. 3. 412

FACTOR.

1. A factor cannot pledge the goods of his principal: therefore, where goods were conſigned from abroad to a factor to be ſold on account of the conſignor, and a bill of lading was ſent to deliver the goods to the factor or his aſſigns, and the factor afterwards indorſed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with inſtructions to do the needful, and the defendants made advances to him on the credit of thoſe and other goods, without knowing that he was not the owner of them: Held that the defendants could not retain the goods againſt the conſignor until payment of the debt due to them from the factor on account of theſe advances. *Martini* v. *Coles and Others*, H. 53 G. 3. Page 140

2. Where ſugars were ſhipped from abroad under a bill of lading, which expreſſed that they were on account of the plaintiffs, and were to be delivered to *W.* and their aſſigns, and *W.* who were the agents of the plaintiffs for the management of their property conſigned from abroad, indorſed the bill of lading, together with the other bills of lading compriſing the reſt of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted and paid, and ſold the ſugars at two months' credit, at the expiration of which they carried the amount of the proceeds to the account of *W.*, who in the interval between the ſale and the expiration of the credit had become bankrupts: Held that the plaintiffs were entitled to recover the proceeds of ſuch ſale from the defendants. *Shipley and Others* v. *Kymer and Others*, E. 53 G. 3. 484

FISHERY.

See Impress. Rate, 4.

FRAUDS.

FRAUDS, STATUTE OF.

1. Where the defendant agreed *by a written contract* to purchaſe of the plaintiffs 300 hogs of bacon, to be delivered at fixed times and in ſpecified quantities, and after a part of the bacon had been delivered, requeſted the plaintiffs, as the ſale was full, not to preſs the delivery of the reſidue; to which the plaintiffs aſſented: this was to be underſtood only as a *parol* diſpenſation of the performance of the original contract, *in reſpect to the times of the delivery*, and therefore was not affected by the ſtatute of frauds: the defendant was held liable for not accepting the reſidue within a reaſonable time afterwards. *Cuff and Others* v. *Penn*, *H.* 53 *G.* 3. Page 21

2. The 29 *Car.* 2. *c.* 3., which requires a will of lands to be atteſted and ſubſcribed in the preſence of the deviſor, means that he ſhould be in a ſituation that he may ſee the witneſſes atteſt: therefore where the atteſting witneſſes retired from the room where the teſtator had ſigned, and ſubſcribed their names in an adjoining room, and the jury found that from one part of the teſtator's room a perſon by inclining himſelf forwards with his head out at the door might have ſeen the witneſſes, but that the teſtator was not in ſuch a ſituation in the room that he might by ſo inclining have ſeen them; Held that the will was not duly atteſted. *Doe, on the Demiſe of Wright and Others*, v. *Manifold and Another*, *E.* 53 *G.* 3. 294

FRAUDULENT CONTRACT,

See CARRIER.

FREIGHT,

See ASSUMPSIT, 1. INSURANCE, 10, 11.

Where the conſignees of a *Weſt India* cargo, deliverable by bill of lading to them or their aſſigns, he or they paying freight for the ſame, indorſed it to the defendants, their brokers, for advances made by them, and the cargo on its arrival was landed at the *Weſt India* docks in the names of the conſignees, but was entered at the cuſtom-houſe by the defendants in their own names, and afterwards the defendants obtained delivery from the *Weſt India* docks under an order from the conſignees for that purpoſe, and not under the bill of lading: Held that the receipt of the cargo by the defendants under the order of the conſignees was not a ſufficient ground to raiſe an implied aſſumpſit on their part to pay the freight, and the entry at the cuſtom-houſe made no difference; but as it appeared from previous dealings that the defendants had been in the habit of receiving goods in the ſame manner and paying the freight for them, that was conſidered ſufficient to raiſe ſuch an implied promiſe. The lien of the plaintiffs (the ſhipowners) for freight continued after the landing of the cargo at the *Weſt India* docks, although they did not give notice to the Company to retain the cargo until payment of the freight. *Wilſon and Others* v. *Kymer*, *M'Taggart*, *and Others*, *H.* 53 *G.* 3. 157

GAMING.

Money *fairly* loſt at play cannot be recovered back in an action of debt for money had and received not founded on the ſtatute. *Thiſtlewood* v. *Cracroft and Darley*, *E.* 53 *G.* 3. 500

GUARANTIE.

A paper-writing was given by the defendant to *A.* (to whoſe houſe the plaintiffs had declined to furniſh goods on their credit alone) to this effect:

effect: "I understand *A.* and Co. have given you an order for rigging, &c. I can assure you, from what I know of *A.*'s honor and probity, you will be perfectly safe in crediting them to that amount: *Indeed I have no objection to guaranty you against any loss from giving them this credit*;" which paper was handed over by *A.* to the plaintiffs, together with a guarantie from another house, which they required in addition, and the goods were thereupon furnished: Held that the paper did not amount to a guarantie, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guarantie. *M'Iver and Another* v. *Richardson*, *E.* 53 *G.* 3. Page 557

HUSBAND AND WIFE.

Husband alone cannot be the petitioning creditor to support a commission of bankruptcy, in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife dum sola. *Ramsey, Assignee of Collins, a Bankrupt*, v. *George and Another*, *Ex.* 53 *G.* 3. 177

HUSTINGS.

By stat. 51 *G.* 3. *c.* 126., one of two candidates for the city of *Westminster* is only liable to the bailiff for a moiety of the expences of the buildings. *Morris* v. *Lord Cochrane*, *E.* 53 *G.* 3. 283

IMPRESS.

The 50 *G.* 3. *c.* 108. *s.* 2., which exempts certain persons, who shall be employed in *the fisheries of the king-dom*, from being impressed, extends to a lobster fishery, carried on by *British* subjects upon the coast of *England* for the purpose of supplying the *London* market with that fish: and therefore the Court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery. *Samuel Payne* and *John Thoroughgood*'s case, *H.* 53 *G.* 3. Page 223

INDICTMENT,

See COSTS, 2.

1. Plea of auter foits acquit, which does not state the record of acquittal, is bad. On writ of error brought on a judgment of conviction for felony at the general quarter sessions, this Court will only look to the record of conviction, although the justices return also the record of a former acquittal. *The King* v. *Thomas Wildey*, *H.* 53 *G.* 3. 183

2. Indictment charging an individual with the repair of a bridge *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a *private* act of parliament, must set forth the act. *The King* v. *Mathias Kerrison*, *E.* 53 *G.* 3. 435

INFANT,

See NECESSARIES. PLEADING, 5.

INSURANCE,

See PARTNERS, 2. WITNESS, 1.

1. Where the plaintiffs effected a policy of assurance on wines, from *Oporto* to *London*, on the 12th of *November*, at which time they were in possession of two letters from their correspondents at *Oporto*; the first of which, dated 11th of *October*,

ber, ſtated thus; "*We are loading the wines on the* Stag, *Captain* Wheatley, *who pretends to ſail after to-morrow;*" the other, dated the 13th of *October*, incloſed the bills of lading, which were filled up "*with convoy;*" which letters the plaintiffs did not communicate to the underwriters: Held that it was a material concealment. *Bridges and Others* v. *Hunter*, *H.* 53 *G.* 3. Page 15

2. An aſſured on bottomry cannot recover againſt the underwriter, unleſs there has been an actual total loſs of the ſhip: for if the ſhip exiſt in ſpecie, in the hands of the owners, though under circumſtances that would entitle the aſſured on the ſhip to abandon, it will prevent its being an utter loſs within the meaning of the bottomry bond. *Thompſon* v. *The Royal Exchange Aſſurance Company*, *H.* 53 *G.* 3. 30

3. Where the plaintiffs, on the 25th of *October*, effected an inſurance on ſhip at and from her port of loading to her port of diſcharge, and it appeared that on the 25th of *July* preceding, the ſhip, whilſt in her port of loading, was driven on a rock by a ſtorm, but got off without appearing to have ſuffered material damage; and the captain afterwards wrote a letter to the plaintiffs without communicating the accident; which letter reached them on the 5th of *October*; and the ſhip afterwards arrived at her port of diſcharge, where the captain made a proteſt, detailing the accident, and ſtating that the planks of her bottom muſt have been chafed, and her bottom otherwiſe injured, by ſtriking on the rock: Held that the plaintiffs could not recover as for an average loſs ariſing from the accident; for the captain was bound to communicate the accident, and for want of ſuch communication, the antecedent damage was an implied exception out of the policy: and the policy not being made void, the plaintiffs could not recover back the premium. *Gladſtone and Another* v. *King*, *H.* 53 *G.* 3. Page 35

4. Where a licence was granted to the plaintiff on the 25th of *May* 1810, to take a cargo from *London* to *Archangel*, and to return from thence with a cargo of grain and other goods permitted by law to be imported to any part of the United Kingdom, and the licence was limited to the 29th of *September* following, which time was afterwards extended to the 1ſt of *January* 1811, and the ſhip, after taking in a cargo of pitch and tar at *Archangel*, ſailed on her homeward voyage on the 13th of *October* 1810, but was driven back to *Archangel*, and there unloaded, and her cargo ſold, and the ſhip laid up for the winter, and did not ſail again from thence with a cargo of wheat until the 1ſt of *Auguſt* 1811: Held that the licence was not exhauſted by taking in the firſt cargo of pitch and tar, but would cover the cargo of wheat alſo, notwithſtanding the time limited for its continuance had elapſed, provided it appeared that the voyage was proſecuted with all reaſonable diſpatch, which was a queſtion for the jury; and therefore if it ſhould ſo appear, an inſurance effected by the plaintiff on the 18th of *Auguſt* 1811, on wheat at and from *Archangel* to *London*, would be valid, and would attach on the wheat cargo; but an inſurance on money advanced to the captain at *Archangel* was void, and upon that the plaintiff might recover back the premium. *Siffken* v. *Allnutt*, *H.* 53 *G.* 3. 39

5. Where goods were inſured from *Heligoland* to *Memel*, with liberty to touch at any ports and to ſeek, join, and exchange convoy, warranted free from capture in the port of *Memel*, and the ſhip ſailed from *Heligoland* with orders to go to *Gottenburgh*

burgh to know whether to proceed to *Anholt* or *Memel*, and was captured in her way to *Gottenburgh*, which is in the track either to *Anholt* or *Memel*: Held that this was to be considered as a voyage to *Memel*, although it was subject to be changed according to circumstances upon the ship's arrival at *Gottenburgh*; and therefore the risk commenced on her leaving *Heligoland*; and the ship never having reached *Gottenburgh*, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable. *Heselton* v. *Allnutt*, *H.* 53 *G.* 3. Page 46

6. A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against *British* capture; for that is not a crime so as to render the whole insurance illegal, though it would be void pro tanto. *Glaser and Another* v. *Cowie and Another*, *H.* 53 *G.* 3. 52

7. Where the plaintiffs declared on a policy of assurance, and averred that they were the persons residing in *Great Britain who received the order for* and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the *Ann*, or ships, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the *Herald*, the ship mentioned in the letter. *Bell and Others* v. *Janson* *H.* 53 *G.* 3. Page 201

8. A licence granted under an order in council to *H. S.* (a *British* resident merchant), permitting a vessel, bearing any flag except the *French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*, there to load a cargo of such goods as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to *H. S.*, or any particular class of persons: and therefore where *Russian* subjects at *Archangel*, who were alien enemies, had shipped goods under such licence for the purpose of being brought into this country, it was held that they were protected by it; and an insurance made for their benefit was legal. *Robinson and Others* v. *Touray*, *H.* 53 *G.* 3. 217

S. P. *Same* v. *Cheesewright*, *H.* 53 *G.* 3. 220

9. A mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. *ib.*

10. Where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of freight, to be paid at one month from the discharge of her cargo at *Liverpool*; and the ship owners effected a valued policy on the freight at and from *Jamaica* to her port of discharge in the United Kingdom; and the ship arrived at *Jamaica*, and after taking on board one half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped: Held that the assured were entitled

to recover as for a total loſs. *Davidſon and Another* v. *Willaſey*, *E.* 53 *G.* 3. Page 313

11. Action on a policy on ſhip at and from *London* to the *Eaſt Indies*, until her arrival at her port of diſcharge *on the outward voyage*. Loſs by perils of the ſeas. Ship was chartered from *London* to the *Eaſt Indies*, there to deliver her outward cargo and return thence with a cargo for *England* into the *Thames*, and there make a true delivery, &c.; and it was agreed that the charterers ſhould, upon condition that the ſhip performed her voyage and arrived at *London*, and not otherwiſe, pay freight *for every ton of goods that ſhould be brought home* at ſo much per ton; the ſhip ſailed on the voyage inſured, and in the courſe of her outward voyage incurred an average loſs, but was repaired and afterwards performed her voyage, and the freight was received: Held that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in reſpect of ſuch contribution. *Williams* v. *The London Aſſurance Company*, *E.* 53 *G.* 3. 318

12. Where a policy of aſſurance was on goods at and from *Pernambuco* to *Maranham*, and from thence to *Liverpool*, beginning the adventure on the goods from the loading thereof, on board the ſhip *whereſoever*: Held that it would cover goods previouſly loaded at *Liverpool*, and which arrived at *P.*, but were not unloaded there, and afterwards ſuſtained a partial loſs by wreck in the voyage from *P.* to *M.* *Gladſtone and Another* v. *Clay*, *E.* 53 *G.* 3. 418

13. Though a ſtate may be in the military poſſeſſion of one of two belligerents, that will not conſtitute her ſubjects enemies to the other belligerent, if the ſovereign power of the latter chooſes to permit a continuance of commerce with them; therefore where an inſurance was effected on property, ſhipped in this country on account of perſons who were domiciled at *Hamburgh*, at a time when that country was in the poſſeſſion of *French* troops, the ſenate continuing to exerciſe the powers of civil government in the ſame manner as before: Held that the aſſured were entitled to recover for a loſs which happened in the courſe of a voyage permitted by his majeſty's orders in council. *Hagedorn* v. *Bell*, *E.* 53 *G.* 3. Page 450

14. A licence to *J. H.* of *London*, merchant, on behalf of himſelf and other *Britiſh* or neutral merchants, to import a cargo from certain limits, within which an enemy's port is ſituate, in any veſſel bearing any flag except the *French*, will protect a ſhip trading from that port, in which ſhip *J. H.* and an alien enemy are jointly intereſted; and therefore ſuch intereſt was held inſurable. *Hagedorn* v. *Reid*, *T.* 53 *G.* 3. 567

15. A natural-born ſubject of this country, domiciled in a foreign country in amity with this, may lawfully exerciſe the privileges of a ſubject of the country where he is domiciled to trade with another country in hoſtility with this; therefore where plaintiff, a *Britiſh*-born ſubject domiciled in *America*, effected a policy of aſſurance on ſhip, freight, and goods, at and from *Virginia* to any ports in the *Baltic*, and the ſhip was captured in her way to *Elſineur*, in *Denmark*, *Denmark* being in amity with *America*, but at war with this country: Held that the plaintiff was entitled to recover. *Bell* v. *Reid*, *T.* 53 *G.* 3. 726

INTEREST.

In an action of debt to recover a ſum awarded to the plaintiffs by a jury under

under the 43 *G.* 3. *c.* 140., and 48 *G.* 3. *c.* 11., as a compenſation to be made by the *Briſtol* dock company for an injury done to the plaintiff's property by means of the works authorized by thoſe acts: Held that the jury might give intereſt for the detention of the ſum awarded. *Hilhouſe and Others* v. *Davis*, *H.* 53 *G.* 3. Page 169

JUDGMENT,

See PLEADING, 2, 3, 4.

Where interlocutory judgment was ſigned, and the plaintiff died on a ſubſequent day in the term; the Court granted a rule to compute principal and intereſt on the bill on which the action was brought. *Berger* v. *Green*, *H.* 53 *G.* 3. 229

JUSTICES.

1. The Court will not grant a mandamus to the juſtices at ſeſſions to rehear an appeal againſt an order of removal, after judgment given by them, and entered by the clerk of the peace for quaſhing the order; upon the ground that the juſtices at ſeſſions were divided in opinion, and that the judgment was entered by miſtake, inſtead of an adjournment of the appeal. *The King* v. *The Juſtices of Leiceſterſhire*, *E.* 53 *G.* 3. 442

2. The juſtices at ſeſſions may alter their judgment during the continuance of the ſeſſions. *ib.*

LANDLORD AND TENANT,

See LEASE.—MONEY HAD AND RECEIVED, 2.

The landlord of premiſes upon which the goods of his tenant are taken in execution can only claim from the party ſuing the execution the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the ſheriff in poſſeſſion. *Hoſkins* v. *Knight, and Baſſet and Another* v. *Knight*, *E.* 53 *G.* 3. Page 245

LATITAT.

The Court ſet aſide a latitat directed to the ſheriff of Middleſex for irregularity. *Price* v. *Jackſon*, *E.* 53 *G.* 3. 442

LEASE.

Where a leaſe contained a proviſo for re-entry in caſe the tenant ſhould demiſe, leaſe, grant, or let the demiſed premiſes, or any part or parcel thereof, or convey, &c. to any perſon whomſoever, for all or any part of the term, without the licence of the leſſor in writing; and the defendant, without ſuch licence, agreed with a perſon to enter into partnerſhip with him, and that he ſhould have the uſe of the back-chamber and ſome other parts of the premiſes *excluſively*, and of the reſt jointly with the defendant, and accordingly let him into poſſeſſion: Held that the leſſor was entitled to re-enter. *Roe dem. Dingley* v. *Sales*, *E.* 53 *G.* 3. 297

LIBEL.

A member of the Houſe of Commons may be convicted upon an indictment for a libel in publiſhing in a newſpaper the report of a ſpeech delivered by him in that Houſe, if it contain libellous matter, although the publication be a correct report of ſuch ſpeech, and be made in conſequence of an incorrect publication having appeared in that

and other newſpapers. *The King* v. *Creevey, Eſq. M.P., E.* 53 *G.* 3. Page 273

LICENCE,

See INSURANCE, 4. 8. 14.

LIEN,

See ATTORNEY, 1, 2. — FACTOR, 1. — FREIGHT, 1.

LOBSTER FISHERY,

See IMPRESS.

MANDAMUS,

See APPEAL, 1.

1. The Court will not grant a mandamus to compel a canal company, purſuant to the proviſions of an act of parliament, to proceed to an aſſeſſment, of the value of land taken by them for the purpoſes of their canal; and alſo of the recompence to be made for the damages thereby ſuſtained; if the parties intereſted in the land do not make their application to the Court within a reaſonable time after the land was taken by the company, eſpecially if the parties have another remedy by ejectment. *The King* v. *The Stainforth and Keadby Canal Company, H.* 53 *G.* 3. 32

2. Where a charter of incorporation of *H.* 7., granted to the citizens and commonalty in theſe words: "Quod ipſi & ſucceſſores ſui in perpetuum *ſingulis annis ſucceſſivis* 24 concives civitatis in aldermanos, necnon 40 alios cives ejuſdem civitatis pro communi conſilio civitatis illius eligere facere & creare *poſſint*;" and it appeared that in the year 1693, and the two following years, ſucceſſive elections of the 40 common councilmen had been made, ſince which time the uſage had been not to elect the aldermen or common councilmen annually; the Court refuſed a mandamus, which was applied for in order to raiſe the queſtion againſt the uſage, whether the elections of thoſe officers ought to be annual, there being another remedy open to the parties making this application. *The King* v. *The Mayor and Citizens of Cheſter, H.* 53 *G.* 3. Page 101

3. Where the weavers preſented a petition to the juſtices at ſeſſions, praying them to limit a rate of wages, according to the proviſions of ſtat. 5 *Eliz. c.* 4. *ſ.* 15., and 1 *Jac.* 1. *c.* 6. *ſ.* 3., and the juſtices heard the petition and counſel in ſupport of it, and after making inquiry and examining witneſſes upon the ſubject, determined that they could not make any rate more beneficial to the weavers: this Court refuſed a mandamus to the juſtices to hear and determine, although they did not examine the witneſſes tendered by the petitioners, nor any witneſſes upon oath, or in open court. *The King* v. *The Juſtices of Cumberland, H.* 53 *G.* 3. 190

4. The Court will not grant a mandamus to the juſtices at ſeſſions to re-hear an appeal againſt an order of removal, after judgment given by them, and entered by the clerk of the peace for quaſhing the order; upon the ground that the juſtices at ſeſſions were divided in opinion, and that the judgment was entered by miſtake inſtead of an adjournment of the appeal. *The King* v. *The Juſtices of Leiceſterſhire, E.* 53 *G.* 3. 442

5. The 16 *G.* 3. *c.* 30., which gives an appeal to the ſeſſions againſt a conviction for deer-ſtealing, requires the perſon appealing to give ſix days notice; and if an appeal be entered without notice, the ſeſſions have no authority to adjourn it to the next ſeſſions: where the ſeſſions did ſo adjourn the appeal, and at the next ſeſſions it was diſmiſſed for want

want of notice, the Court refuſed to grant a mandamus to the juſtices to re-hear it. *The King* v. *The Juſtices of Oxfordſhire, E.* 53 *G.* 3. Page 446

6. The 13 *G.* 1. *c.* 23. *ſ.* 5., for ſettling "diſputes between clothiers or makers of woollen goods, and weavers, or perſons employed in ſuch manufactures," does not relate to demands againſt clothiers by the owner of a ſcribbling and carding mill for work done by him for the clothiers in teaſing, ſcribbling, carding, and ſtubbing the wool at his mill: therefore the Court refuſed a mandamus to two juſtices to hear and determine ſuch demands. *The King* v. *T. P. Heywood Eſq. and Another, T.* 53 *G.* 3. 624

7. Where a charter of incorporation after ordaining who ſhould be entitled to be burgeſſes, directed that they ſhould make application for that purpoſe to the mayor and commonalty *on a day certain* in each year, and *at no other time*, and *then* make due and legal proof of their qualifications, and *A.* and *B.* claiming to be admitted burgeſſes, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received on account of the time having been ſpent in other buſineſs; the Court granted a mandamus to the mayor and commonalty to enter an adjournment to a ſubſequent day, and then to hold a meeting, and receive and examine ſuch proofs, &c.: and a return to ſuch mandamus that it was impoſſible for *A.* and *B.*, before the expiration of the charter day, to make due and legal proof, &c., according to the intent of the charter, by reaſon of the day being conſumed in the neceſſary buſineſs of the borough, and that the mayor and commonalty were not authorized to hear ſuch proof on any other than the charter day, &c., was held ill and quaſhed. *The King* v. *The Mayor, Burgeſſes, and Commonalty of Carmarthen, T.* 53 *G.* 3. Page 697

MEMORIAL,

See ANNUITY.

MONEY HAD AND RECEIVED.

See BANKRUPT, 4. — GAMING.

1. The ſheriff's return to a writ of fi. fa. that he has levied the money is not ſufficient evidence to prove that he has paid it over to the judgment creditor ſo as to charge the latter with the receipt of it, in an action for money had and received. *Cator, Aſſignee of Sparkes, Bankrupt,* v. *Stokes, Gent., T.* 53 *G.* 3. 599

2. Where the tenant of premiſes, under a leaſe, and at a rent payable half-yearly, agreed to pay all taxes, except the landlord's property-tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord alſo agreed to allow, but afterwards diſtrained for half-a-year's rent, and ſold to the whole amount, without allowing either for repairs or property-tax, which he knew the tenant had paid to the collector: Held that the tenant might recover, in reſpect of the property-tax, but not in reſpect of the repairs, in an action for money had and received againſt the landlord. *Graham* v. *Tate, T.* 53 *G.* 3. 609

3. Where the holder of a bill of exchange, who held it in truſt for plaintiff, ſued the drawer, and, pending that ſuit, became bank-

rupt. and his aſſignees afterwards brought an action againſt the drawer in the bankrupt's name, in which action, the ſheriff having been guilty of an eſcape on meſne proceſs, the aſſignees recovered againſt the ſheriff in an action for the eſcape, damages to the amount of the bill: Held that the plaintiff might maintain money had and received againſt the aſſignees for the damages ſo recovered, allowing to them the coſts and expences. Diſſentient Lord *Ellenborough* C. J. — *Randoll* v. *Bell and Another*, *T.* 53 *G.* 3 Page 714

MONTH.

The word month may mean lunar or calendar month, according to the intention of the contracting parties: therefore where upon a ſale of land on the 24th of *January*, it was agreed by the conditions of ſale that an abſtract of the title ſhould be delivered to the purchaſer within a fortnight from the date thereof, to be returned by him at the end of two months from the ſaid date, and that a draft of the conveyance ſhould be delivered within three months from the ſaid date, to be re-delivered within four months from ſaid date, and the purchaſe to be completed on the 24th of *June*, making a period of preciſely five calendar months from the date of the ſale and conditions, the word months was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with reſpect to its delivery within the preciſe time. *Lang and Another, Aſſignees of Bazeley, a Bankrupt*, v. *Gale*, *H.* 53 *G.* 3. 111

NECESSARIES.

In an action for goods ſold to an infant, the iſſue being *neceſſaries*, if any part of the articles proved to have been furniſhed to the defendant, may fall within the deſcription of neceſſaries, the evidence ought to be left to the jury. *Maddox and Another* v. *Miller*, *T.* 53 *G.* 3. Page 738

NEW TRIAL,

See SET OFF, 3.

NOTICE,

See APPEAL, 1. — BILLS OF EXCHANGE, 3. 5, 6. — CARRIER, 1. MANDAMUS, 5. — PRACTICE, 4. 19.

The notice of appeal required by 13 *G.* 3. *c.* 78. *ſ.* 80. againſt a diſtreſs for non-payment of a highway rate, may be within ſix days after the levy, and need not be within ſix days after the granting the warrant of diſtreſs. The notice of appeal need not diſcloſe the ground upon which the appellant objects to the regularity of the diſtreſs. *The King* v. *The Juſtices of Devon*, *E.* 53 *G.* 3. 411

OUTLAWRY,

See PRACTICE, 7. — SCIRE FACIAS.

PARLIAMENT,

See LIBEL.

PARTNERS,

See EVIDENCE, 3.

1. Where the executors of a deceaſed partner continued his ſhare of the partnerſhip property in trade for the benefit of his infant daughter: Held that they were liable upon a bill

bill drawn for the accommodation of the partnerſhip, and paid in diſcharge of a partnerſhip debt; although their names were not added to the firm, but the trade was carried on by the other partners under the ſame firm as before, and the executors when they divided the profits and loſs of the trade, carried the ſame to the account of the infant, and took no part of the profits themſelves. *Wightman* v. *Townroe*, *Dickons*, *Thomas and James Watſon*, *and Aram*, *E.* 53 *G.* 3. Page 412

2. Money advanced to *S.* by *B.*, one of ſeveral partners, out of the partnerſhip funds, on account of payments to be made on policies of aſſurance underwritten by *S.*, on account of himſelf and *B.*, in purſuance of a previous agreement between them to ſhare the profits and loſs on ſuch policies, was held not proveable under the commiſſion of *S.*, who became bankrupt, by the ſurviving partners of *B.* *Ex parte John Bell and Others in the matter of Scott*, *Bankrupt*, *T.* 53 *G.* 3. 751

PLEADING.

1. If the plaintiff declare as reverſioner for an injury done to his reverſion, the declaration muſt allege it to have been done to the damage of his reverſion, or muſt ſtate an injury of ſuch a permanent nature as to be neceſſarily injurious to his reverſion; otherwiſe the want of ſuch allegation will be cauſe for arreſting the judgment: therefore where the plaintiff declared as reverſioner of a yard and part of a wall which *W. F.* occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the ſaid part of the wall quantities of bricks and mortar, &c., and thereby raiſed it to a greater height than before, and placed pieces of timber, &c. on the ſaid wall, overhanging the yard, per quod the plaintiff during all the time loſt the uſe of the ſaid part of the wall, and alſo by means of the timber, &c. overhanging the wall, quantities of rain and moiſture flowed from the wall upon the yard, and thereby the yard and ſaid part of wall have been injured, to the damage of the plaintiff, &c.; without ſtating that his reverſion was prejudiced: the Court arreſted the judgment. *Jackſon* v. *Peſked*, *H.* 53 *G.* 3. Page 234

2. A judgment confeſſed by an executrix to a creditor of the teſtator as well for his own debt as in truſt for the debts of many of the creditors cannot be pleaded in bar to an action brought againſt her by another creditor of the teſtator. *Tolputt* v. *Ann Wells*, *executrix of Wells deceaſed*, *E.* 53 *G.* 3. 395

3. Plea that *M.* recovered a judgment againſt defendant as executrix for 1990*l.* claimed to be *due to him* from the teſtator; rejoinder that the judgment was confeſſed to *M.* for that ſum *for his own debt and as truſtee for the debts of many other creditors:* Held that the rejoinder was a departure from the plea. *ib.*

4. *Quære*, if a plea of judgment recovered ought to ſtate the cauſe of action. *ib.*

5. Replication to a plea of infancy, that defendant, ſince the making of the promiſes, attained 21, and that before the exhibiting of the bill he ratified and confirmed the promiſes, is good after verdict, though it omit to allege that he ratified and confirmed after he came of age. *Cohen* v. *Armſtrong*, *T.* 53 *G.* 3. 724

POOR-RATE,

See RATE.

PRACTICE,

See AFFIDAVIT. BAIL, 3, 4. JUDGMENT.

1. If plaintiffs ſue out joint and bailable proceſs againſt four defendants, they cannot declare againſt one ſeparately, though the others are out of the juriſdiction of the Court. *Thompſon and Another, Executors, &c.* v. *Cotter, Kellett, and two Others, H.* 53 *G.* 3. Page 55
2. In an affidavit to hold to bail, the plaintiff's clerk may ſtate his place of abode to be the office where he is employed the greater part of the day, though at night he ſleeps at another place. *Haſlope* v. *Thorne, H.* 53 *G.* 3. 103
3. A writ of error in parliament may be non proſſed without carrying over the tranſcript to the court of error. *Milborn* v. *Copeland, H.* 53 *G.* 3. 104
4. The *Engliſh* notice to appear at the foot of a writ of attachment muſt contain the date of the day of appearance in words at length, not figures. *Pinero, Gent.* v. *Hudſon, H.* 53 *G.* 3. 119
5. A ſpecial capias iſſued upon an affidavit ſworn at the bill of *Middleſex* office is irregular: but if the defendant be arreſted under it, and put in ſpecial bail, he thereby waves the irregularity. *Dalton* v. *Barnes, H.* 53 *G.* 3. 230
6. The rule that a voluntary appearance ſhall be of none effect unleſs ſome proceſs be ſued out within 14 days after ſuch appearance, cannot be taken advantage of by any but the defendant unleſs ſome particular fraud is alleged. *Mackreth* v. *Jackſon, Executrix, H.* 25 *G.* 3. 408. *n.*
7. The Court *upon motion* reverſed the outlawry of the defendant in a civil ſuit upon his putting in bail in the alternative, to ſatisfy the condemnation money, or render the principal, and paying all coſts, including coſts, if any, in the court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money abſolutely. *Graham and Another* v. *Grill, E.* 53 *G.* 3. Page 409
8. The Court ſet aſide a latitat directed to the ſheriff of *Middleſex* for irregularity. *Price* v. *Jackſon, E.* 53 *G.* 3. 442
9. Judgment of non pros for not entering the iſſue, cannot be ſigned unleſs there be a rule to enter the iſſue of the ſame term in which ſuch judgment is ſigned. *Lancaſter* v. *Fraſer, E.* 53 *G.* 3. 478
10. The defendant in a country cauſe is entitled to eight days' notice to plead, although he has appeared and is reſident about two miles from *London. Holland* v. *Cooke, T.* 53 *G.* 3. 566
11. The defendant was allowed to enter ſatisfaction on the roll upon a judgment obtained againſt him in this court on his acknowledging ſatisfaction for the amount upon a judgment obtained by him in *C. P.* againſt the plaintiff for a larger amount, although he had the plaintiff in cuſtody in execution of that judgment. *Simpſon* v. *Hanley and Another, T.* 53 *G.* 3. 696
12. A copy of a bill filed againſt an attorney, partly printed and partly written, on one ſheet of paper, ſtamped with a 4*d.* ſtamp, which contained ſeveral printed counts, with two of them ſtruck out, and was otherwiſe obliterated, and exceeded 17 common law folios, was held to be irregular, as not being a copy written in the uſual and accuſtomed manner, on which the duty of 4*d.* per

per ſheet is impoſed by ſtat. 48 *G.* 3, *c.* 149. ſched. 2. And it appearing that the bill was framed in the ſame manner, with the ſame obliterations, the Court alſo ſet that aſide as being contrary to the practice of the court. *Hartop* v. *Juckes, Gent. One, &c., T.* 53 *G.* 3. Page 709

PROCESS.

If plaintiffs ſue out joint and bailable proceſs againſt four defendants, they cannot declare againſt one ſeparately, though the others are out of the juriſdiction of the Court. *Thompſon and Another, Executors, &c*, v. *Cotter, Kellett, and two Others, H.* 53 *G.* 3. 55

PROMOTIONS, Pages 564, 566

QUO WARRANTO.

Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor purſuant to charter: Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the ſacrament within one year, were not thrown away ſo as to authorize the returning officer to return another candidate who was in a minority. *The King* v. *Bridge, H.* 53 *G.* 3. 76

RATE.

1. Land, of which the annual value is improved by a ſpring riſing within it, may be rated to the poor at ſuch improved value, although the owners of the land, who are alſo occupiers, do not receive any of the profits derived from the ſpring, nor does any part become due in the pariſh where the land lies. *The King* v. *The Governor and Company of the New River, E.* 53 *G.* 3. Page 503
2. The leſſees, under the lord of the manor, of lot and free ſhare of all calamine raiſed within the manor, are liable to be rated to the poor, as *occupiers of land*, in the pariſh where the manor lies; none of them being reſident in the pariſh. *The King* v. *The Baptiſt Mill Company, T.* 53 *G.* 3. 612
3. Where a company were empowered by act of parliament to lay under ground, through the ſtreets of a town, main pipes for the conveyance of water, and the inhabitants with the company's conſent to lay pipes communicating with ſuch main pipes to their houſes, paying to the company a rate for ſuch privilege; Held that the company were rateable to the poor in the pariſh where the main pipes lay in reſpect of thoſe pipes, and the rates paid thereon. *The King* v. *The Company of Proprietors of Rochdale Waterworks, T.* 53 *G.* 3. 634
4. The leſſee of all thoſe fiſhings of the halves and halvendoles, with the appurtenants to the halves due and accuſtomed within the river *Severn*, between certain limits within a manor bordering on the ſaid river, and of all royal fiſhes taken between the ſaid limits, put and wheel fiſhing excepted, under an annual rent, is liable to be rated to the poor for ſuch fiſhery. *The King* v. *Ellis, T.* 53 *G.* 3. 652

REGISTRY,

See SHIP.

RENT.

The landlord of premiſes upon which the goods of his tenant are taken in execution can only claim from the

the party ſuing the execution the rent due at the time of taking the goods, and not that which accrues after the taking, and during the continuance of the ſheriff in poſſeſſion. *Hoſkins* v. *Knight*, and *Baſſet and Another* v. *Same*, *E.* 53 *G.* 3. Page 245

REWARD.

Where an advertiſement reſpecting a ſtolen child promiſed a reward to the perſon who would give information where the child was, ſo as that he might be reſtored to his parents, and the plaintiff communicated to the defendant her ſuſpicion where the child was, in order to put the matter into his hands for his benefit, if he choſe to run the riſk, and the child was afterwards reſtored to its parents by the exertions of the defendant acting upon the plaintiff's communication: Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it. *Fallick* v. *Barber*, *H.* 53 *G.* 3. 108

SALE,

See SALE OF GOODS.

If the ſheriff ſell a term under a writ of fi. fa. which is afterwards ſet aſide for irregularity, and the produce of the ſale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term againſt the vendee under the ſheriff. *Doe, on the Demiſe of Emmett*, v. *Thorn*, *E.* 53 *G.* 3. 425

SALE OF GOODS.

Where the huſband of the plaintiff's mother aſſigned his effects to truſtees for the benefit of his creditors, and abſconded, leaving his wife in poſſeſſion of his houſe and goods, and notice of ſuch aſſignment was advertiſed in the newſpaper, and the goods were afterwards ſold by the truſtees at public auction, and the plaintiff purchaſed them in order to accommodate his mother, and paid for them at a fair valuation, and removed ſome, but left the greater part in her poſſeſſion: Held that ſuch purchaſe by the plaintiff would protect the goods againſt a judgment afterwards obtained and execution levied by a creditor of the huſband, who had notice of the aſſignment at the time; although the plaintiff permitted his mother to continue in poſſeſſion: and therefore he was entitled to recover them from the ſheriff. *Leonard* v. *Baker*, *E.* 53 *G.* 3. Page 251

SCIRE FACIAS.

Where plaintiff brought an action againſt two defendants, and proceeded to outlawry againſt one, and went on with the action againſt the other, who died after interlocutory and before final judgment: Held that he could not have a ſcire facias againſt his adminiſtrator; for notwithſtanding the outlawry, the action remained joint, and therefore ſurvived againſt the other defendant. *Fort and Others, Aſſignees, &c.* v. *Catharine Oliver, Adminiſtratrix, &c.* *H.* 53 *G.* 3. 242

SESSIONS.

See APPEAL, 1. CERTIORARI, 1, 2. MANDAMUS, 4, 5.

The juſtices at ſeſſions may alter their judgment during the continuance of the ſeſſions. *The King* v. *The Juſtices of Leiceſterſhire*, *E.* 53 *G.* 3. 442

SET-OFF.

See ATTORNEY, 1. PRACTICE, 11.

1. Where a broker effected policies of aſſurance in the name of his principal

pal under a del credere commiſſion: Held that he could not ſet off loſſes which happened on thoſe policies in an action by the underwriter to recover premiums, although the loſſes claimed were total, and the broker had accounted for them with his principal. *Cumming* v. *Foreſter and Others*, *E.* 53 *G.* 3. Page 494

2. It ſeems that money due for advances made by a banker to his cuſtomer upon a bond given by the cuſtomer to one of the partners, in truſt for the reſt, may be ſet off in an account current between them. *Croſſe and Others, Aſſignees of Fea and Others, Bankrupts*, v. *Smith, Thompſon, and Others*, *E.* 53 *G.* 3. 545

3. A broker, who pays to *A.* the price of goods ſold by him for *A.* under a del credere commiſſion, is entitled to ſet off the amount againſt the aſſignees of *B.*, for whom he bought the goods; and where the jury found a verdict diſallowing ſuch ſet-off, and it was doubtful on the evidence, whether the payment was made before diſcloſure of the name of *A.* to *B.*, the Court granted a new trial. *Morris and Others, Aſſignees of Smith and Others, Bankrupts*, v. *Cleaſby*, *T.* 53 *G.* 3. 576

SETTLEMENT—*by Apprenticeſhip*,

See APPRENTICE.

Where *J. G.* was bound apprentice by indenture in 1764 in the townſhip of *C.*, and upon the death of his maſter in 1769 was aſſigned by the widow by indorſement on the indenture, whereby *ſhe acquitted and aſſigned over her apprentice J. G.* for all the remainder of his apprenticeſhip, and *J. G.* ſerved under ſuch aſſignment in the townſhip of *K.*, which townſhip for the laſt ſeven years had regularly relieved the family of *J. G.* whilſt reſiding in another pariſh: Held that this was evidence from which the ſeſſions ought to have preſumed, after ſuch a diſtance of time, that the widow was executrix and capable of aſſigning the apprentice, and that *J. G.* had acquired a ſettlement in *K.*, and conſequently that his ſon, who had gained no ſettlement for himſelf, was there ſettled; and the ſeſſions having drawn a contrary concluſion, this Court quaſhed the order of ſeſſions. *The King* v. *The Inhabitants of Barnſley*, *E.* 53 *G.* 3. Page 377

SETTLEMENT—*by Certificate.*

A pariſh certificate granted to *T. C.* and *J.* his wife, engaging to receive them, *their child or children born or to be born*, only extends to a ſon, born at the time of granting the certificate ſo long as he continues a part of his father's family; therefore where the ſon married, and reſided with his family apart from his father, in the certified pariſh: Held that his apprentice gained a ſettlement by ſerving him in the ſaid pariſh. *The King* v. *The Inhabitants of the Townſhip of Thwaites*, *T.* 53 *G.* 3. 669

SETTLEMENT—*by Eſtate.*

1. Where the pauper purchaſed a meſſuage for 52*l.*, under an agreement that the vendor ſhould allow 40*l.* of the purchaſe-money to remain upon mortgage, and ſuch mortgage was accordingly made, and 12*l.* only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took poſſeſſion, and reſided in it for ſome years, but was unable to pay the reſt of the purchaſe-money, and afterwards agreed to ſell it to *B.* for 60*l.*, who thereupon paid the 40*l.* to the original vendor, upon his delivering up to him the title-deeds, and the remaining 20*l.* to the pauper, on the execution of the conveyance

conveyance to him, at which time the pauper quitted the meſſuage, not having reſided on it 40 days after the payment of the 40*l.* to the original vendor: Held that the pauper did not gain a ſettlement by reſidence on ſuch eſtate. *The King* v. *The Inhabitants of Olney*, *E.* 53 *G.* 3. Page 387

2. Where a pauper, as freeman of a town, was entitled, during his reſidence there, together with the other freemen, to a ſtinted common of paſture on a neighbouring moor for his own cattle, and alſo to a right to cut peat for his own uſe, and get limeſtones, &c. on the moor, and to put his children to the town-ſchool free of expence, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exerciſed the common of paſture, or had any cattle with which to exerciſe it: Held that theſe rights did not amount to ſuch an eſtate as to make him irremovable. *The King* v. *The Inhabitants of the Townſhip of Warkworth*, *E.* 53 *G.* 3. 473

SETTLEMENT — *by Hiring and Service.*

1. The 40 days reſidence neceſſary to confer a ſettlement by hiring and ſervice, muſt be within the compaſs of a year. *The King* v. *The Inhabitants of Denham*, *H.* 53 *G.* 3. 221

2. Where the father of the pauper contracted with *J. S.* that his ſon ſhould be with him, and ſhould work with him for two years, and have what he got, and ſhould allow 2*s.* per week out of his gains to *J. S.*, viz. 1*s.* for teaching him the buſineſs of a frame-knitter, 9*d.* for the rent of a frame, and 3*d.* for the ſtanding: Held that this was a contract of hiring and ſervice, and not an apprenticeſhip; and that the ſon's having ſerved under it was evidence that he had adopted the contract made by his father; and therefore he was entitled to a ſettlement by ſuch hiring and ſervice. *The King* v. *The Inhabitants of Burbach*, *E.* 53 *G.* 3. Page 370

3. Hiring for a year at 13*s.* 6*d.* per week, and to be at liberty to be abſent during the ſheep-ſhearing ſeaſon, but to find a fit man, *at his own expence*, to do his work during his abſence, *but his own wages to go on during the whole time*, will not gain a ſettlement. *The King* v. *The Inhabitants of Arlington*, *T.* 53 *G.* 3. 622

SETTLEMENT — *by a Tenement of* 10*l. a year.*

1. Where the pauper having a freehold eſtate in the pariſh of *A.* which he had let for 50*s.* per annum, rented a tenement in the pariſh of *B.* of the value of eight guineas per annum, and reſided there 40 days: Held that he did not gain a ſettlement in *B.*; as he could not be conſidered as the occupier of the freehold eſtate. *The King* v. *The Inhabitants of South Benfleet*, *H.* 53 *G.* 3. 154

2. Where a pauper rented ſeparate tenements of the joint yearly value of 10*l.*, in the pariſhes of *T.* and *R.*, and had a houſe in each, in one of which in *R.*, his family reſided, and he ſometimes ſlept in one and ſometimes in the other, and on the laſt night of his holding the tenement in *R.*, having ſlept the preceding night in *T.*, he came to *R.* to pack up his furniture and fetch back his family, and paſſed the night there, but did not ſleep or go to bed, but was occupied in moving, and left the houſe with his family very early the next morning: Held that his ſettlement was at *R.* *The King* v. *The*

The Inhabitants of Ringwood, E. 53 G. 3. Page 381

3. The renting an acre of land at 8*l.*, from *Eaſter* to *October*, for planting potatoes, where the land had been previouſly dug by the landlord for that purpoſe, and would not have been let for more than half that price if it had not been dug, was conſidered as a tenement of the yearly value of 8*l.*, although the caſe ſtated that in a common way an acre of ſuch land would not let for more than 2*l.* *ib.*

4. Renting the tolls of a bridge, veſted by act of parliament in a company of proprietors who are declared a corporation, will confer a ſettlement, although the ſhares of the proprietors are made *perſonal* eſtate, and the renting is not ſtated to be by *deed*. *The King* v. *The Inhabitants of Bubwith, E. 53 G. 3.* 514

5. The 13 *G. 3. c.* 84. (General Turnpike Act), which prohibits perſons from gaining a ſettlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road. *ib.*

SHERIFF,

See MONEY HAD AND RECEIVED, 1. SALE.

SHIP.

The purchaſer of a ſhip which appears by the ſentence of condemnation in the vice-admiralty court abroad to have been taken and condemned for being engaged in the ſlave trade, is not entitled to regiſter ſuch ſhip at the cuſtom-houſe under the 26 G. 3. *c.* 60., as the owner of a ſhip taken and condemned as lawful prize, although he produce a certificate from the Judge of the court abroad certifying that the ſhip was condemned as lawful prize. *The King* v. *The Collector and Comptroller of the Cuſtoms in London, E. 53 G. 3.* Page 262

SLANDER.

1. In an action of ſlander, imputing a ſpecific charge of unnatural practices to plaintiff, where the declaration contains the uſual allegation of good fame, &c., the defendant may, upon croſs-examination, aſk the plaintiff's witneſs whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of ſimilar practices, in order to diminiſh the damages. —— v. *Moor, E. 53 G. 3.* 284

2. Where the plaintiff declared that he had been a woolſtapler at *Cirencester*, and was a brewer at *Oxford*, and that defendant ſpoke of him as ſuch trader theſe words: "Mr. *H.* (the plaintiff) and *B.* have both been bankrupts, Mr. *H.* at *Cirencester*," and gave no evidence of his having been a woolſtapler, but only that he was a brewer at *Oxford*, and proved the words ſpoken to have been theſe, He was a bankrupt at *Cirenceſter*, &c. Held that this proof ſuſtained the allegation that the words were ſpoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirenceſter*. *Hall* v. *Smith, E. 53 G. 3.* 287

SLANDER OF TITLE,

See TITLE, SLANDER OF.

STAMP,

See APPRENTICE. BILLS OF EXCHANGE, 2. PRACTICE, 12.

1. In an indenture of apprenticeſhip a covenant by the apprentice to allow his maſter 2*s.* per week, and to have wages and provide for himſelf during the term, does not require the additional ſtamp required by

by 44 *G.* 3. *c* 98. upon an indenture where a ſum of money is contracted for with the apprentice. *The King* v. *The Inhabitants of the Townſhip of Bradford, H.* 53 *G.* 3. Page 151

2. A miſtake made by the agent in declaring the intereſt in the margin of the policy to be on a ſhip by a wrong name may be rectified by inſerting the true name, without a freſh ſtamp. *Robinſon and Others* v. *Touray, H.* 53 *G.* 3. 217

STATUTES.

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TAXES,

See Collector of Taxes.

The collector of the houſe and window tax under 43 *G.* 3. *c.* 161. may diſtrain, for arrears of thoſe taxes, the goods of a third perſon found on the premiſes charged, though the goods are only borrowed, and the perſon in arrear has other goods of his own on the premiſes ſufficient to ſatisfy the arrears. *Juſon* v. *Dixon, T.* 53 *G.* 3. 601

TITHES,

See Witness, 3.

In an action on the ſtat. 2 & 3 *Ed.* 6. *c.* 13., for not ſetting out the tithe of wheat, barley, oats, peas, and vetches, the jury found a cuſtom throughout the pariſh for the parſon to take the 11th ſhock of wheat, and the 11th cock of barley, &c.: Held

Held, that there was a ſufficient conſideration for the cuſtom as to the wheat, it appearing that the farmer had always been uſed to put the ſheaves into ſhocks, and in caſe of bad weather to open them to dry, and therefore the cuſtom was good: but as to the barley, &c., there was no ſufficient conſideration, it appearing that the farmer only put them into cocks without doing any thing farther, except that in caſe of wet weather, before the parſon tithed them, he opened the cocks of barley and oats, and put them up again, which was in fact for his own benefit: the cuſtom therefore as to the barley, oats, peas, and vetches was held void. *Smyth, Clerk,* v. *Sambrook, H.* 53 *G.* 3. Page 66

TITLE, SLANDER OF.

1. Where the declaration ſtated that the plaintiff was lawfully poſſeſſed of mines and ore gotten and to be gotten from them, and was in treaty for the ſale of the ore, and that the defendant publiſhed a malicious, injurious, and unlawful advertiſement cautioning perſons againſt purchaſing the ore, &c., per quod he was prevented from ſelling; to which the defendant pleaded in juſtification that the adventurers of, or perſons having an intereſt or ſhares in the mines, thought it their duty to caution perſons againſt purchaſing the ore, &c. (purſuing the words of the advertiſement); this plea was held ill on ſpecial demurrer; 1ſt, becauſe it did not diſcloſe the names of the adventurers, or who they were; and 2dly, becauſe it did not ſhew that the defendant, in publiſhing the advertiſement, acted under the direction of the adventurers. The allegation by plaintiff that he was lawfully poſſeſſed of the mines and ore, ſeems a ſufficient allegation of title, unleſs ſpecially demurred to. The allegation that the defendant publiſhed a malicious, injurious, and unlawful advertiſement, ſeems good without the word falſe. *Rowe* v. *Roach. Same* v. *Hoar the Younger, E.* 53 *G.* 3. Page 304

2. In an action for ſlander of title conveyed in a letter, to a perſon about to purchaſe the eſtate of plaintiff, imputing inſanity to *Y.*, from whom the plaintiff purchaſed it, and that the title would therefore be diſputed, per quod the perſon refuſed to complete the purchaſe: Held that the defendant, who had married the ſiſter of *Y.*, who was heir at law to her brother, in the event of his dying without iſſue, was not to be conſidered as a mere ſtranger; and that the queſtion for the jury was not whether they were ſatisfied as men of good ſenſe and good underſtanding that *Y.* was inſane, or that the defendant entertained a perſuaſion that he was inſane upon ſuch grounds as would have perſuaded a man of ſound ſenſe and knowledge of buſineſs, but whether he acted bonâ fide in the communication which he made, believing it to be true, as he judged according to his own underſtanding, and under ſuch impreſſions as his ſituation and character were likely to beget. *Pitt* v. *Donovan, T.* 53 *G.* 3. 639

TOLLS,

See SETTLEMENT BY TENEMENT, 4, 5.

TRESPASS,

See DISTRESS, 2.

TROVER.

In trover againſt ſeveral defendants, all cannot be found guilty on the

ſame count, without proof of a joint converſion by all; therefore where plaintiff brought trover for goods againſt *A.* and *B.* bankrupts, and *C.* and *D.* their aſſignees, and proved that the bankrupts, before the bankruptcy, received and afterwards diſpoſed of the goods by way of pledge, having no authority ſo to do; and that the aſſignees, after the bankruptcy, took poſſeſſion of the goods, and refuſed to deliver them to the plaintiff on demand, and the jury found all the defendants guilty, there being only one count in the declaration: Held that the evidence did not warrant ſuch finding. *Nicoll* v. *Glennie and four Others, and G. Sharpe, W. Sharpe, and G. Sharpe, the Younger*, *T.* 53 *G.* 3. Page 588

TURNPIKE ACT,

See SETTLEMENT BY A TENEMENT OF 10*l.* A-YEAR, 5.

USURY.

An indenture aſſigning to the plaintiffs a contract for the purchaſe of timber, upon certain truſts for ſecuring to themſelves out of the proceeds the re-payment of the purchaſe-money advanced by them, and alſo of a certain balance before due to them, together with intereſt thereon at 5*l.* per cent. up to the time of payment, and alſo the further ſum of 200*l.* as and for a reaſonable profit and compenſation for the trouble they would be at in the buſineſs, and alſo all coſts, charges, damages, and expences which they might be put to on account of the premiſes, is not uſurious upon the face of it; for the 200*l.* allowed for trouble is not neceſſarily to be intended as a colourable reſervation of further intereſt beyond the legal intereſt, but as a compenſation for trouble not comprehended within the words, coſts, charges, damages, and expences; neither is it ſo exceſſive as to be intended as uſurious on that account. *Palmer and Wilkins* v. *Baker*, *H.* 53 *G.* 3. Page 56

VENDOR AND VENDEE,

See SALE.

WARRANT OF ATTORNEY.

Where defendants gave a warrant of attorney to ſecure a ſum certain to be paid half-yearly by inſtalments, with intereſt, on ſpecified days, and that the plaintiff ſhould be at liberty to enter up judgment thereon immediately, but no execution to be iſſued till default made in payment of the ſaid ſum, with intereſt as aforeſaid, by inſtalments, and in the manner hereinbore mentioned: Held that the plaintiff might take out execution for the whole on default in payment of the *firſt* inſtalment. *Leveridge* v. *Forty and Another*, *T.* 53 *G.* 3. 706

WEAVERS,

See MANDAMUS, 3.

WESTMINSTER, CITY OF,

See HUSTINGS.

WILL.

The 29 *Car.* 2. *c.* 3., which requires a will of lands to be atteſted and ſubſcribed in the preſence of the deviſor, means that he ſhould be in a ſituation that he may ſee the witneſſes atteſt: therefore where the atteſting witneſſes retired from the room where the teſtator had ſigned, and ſubſcribed their names in an adjoining room, and the jury found that from one part of teſtator's room a perſon by inclining himſelf forwards with his head out at the door might have ſeen the witneſſes, but that the teſtator was

was not in such a situation in the room that he might by so inclining have seen them: Held that the will was not duly attested. *Doe, on the demise of Wright and Others*, v. *Manifold and Another*, E. 53 G. 3. Page 294

WITNESS,

See WILL.

1. The first and second underwriters upon a policy of assurance, who have paid the loss upon an undertaking made to them by the assured to repay the money in case they failed in an action brought by them against a subsequent underwriter, seem not to be competent witnesses for the defendant in that action, to prove that one of the assured when he effected the policy, misrepresented to them that it was a summer instead of a winter risk: but if on the first trial of that action, it does not appear whether the undertaking was made to the witnesses at the time they paid the loss or afterwards, and after the action was commenced, this Court will send the case down to a second trial in order to ascertain that fact. *Forrester and Others* v. *Pigou*, H. 53 G. 3. 9

2. In an action of slander, imputing a specific charge of unnatural practices to the plaintiff, where the declaration contains the usual allegation of good fame, &c., the defendant may, upon cross-examination, ask the plaintiff's witness whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages. —— v. *Moor*, E. 53 G. 3. Page 284

3. Action against the defendant, occupier of a farm in the township of *Down Holland*, for not setting out tithes. Defence, a farm modus; and the plaintiff shewed by surveys and terriers that no modus within the township was mentioned in them; against which the defendant proved by witnesses an uniform payment of a sum certain in respect of his tenement for upwards of 50 years: Held that the plaintiff might on cross-examination ask those witnesses whether other tenements in *Down Holland* did not pay a similar sum. *Blundell, Clerk, and Thompson* v. *Howard*, E. 53 G. 3. 292

WORDS,

See SLANDER, 2.

END OF THE FIRST VOLUME.

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